



House of Lords
House of Commons
Joint Committee on
Human Rights

The Meaning of Public Authority under the Human Rights Act

Seventh Report of Session 2003–04



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*Report, together with formal minutes and
appendices*

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Summary

The Human Rights Act makes it unlawful for public authorities in this country to act in breach of the fundamental rights and freedoms set out in the European Convention on Human Rights. It allows those who believe their rights have not been respected by public authorities to seek vindication and redress in the courts of the United Kingdom.

This protection was intended to be comprehensive, and the obligation to act compatibly with the Convention was to apply to all those discharging the public functions of the State. This report considers a possible flaw in the design of the Human Rights Act, which undermines the protection it was intended to offer to everyone within the jurisdiction of the UK.

As a result of the combined effects of a restrictive judicial interpretation of one particular subsection of the Act on the one hand, and the changing nature of private and voluntary sector involvement in public services on the other, a central provision of the Act has been compromised in a way which reduces the protection it was intended to give to people at some of the most vulnerable moments in their lives.

The concern addressed by this report is that a narrow judicial view of the meaning of “public authority” in section 6 of the Human Rights Act means that many private and voluntary sector providers of public services are considered to fall outside the scope of the Act, with no obligation to comply with the rights and freedoms it incorporated into domestic law.

Section 6 of the Act defines two types of “public authority” to which those obligations apply—“pure” public authorities, which must act compatibly in all they do, and those authorities which come under this obligation only when discharging a “public function”. This report examines the case law that has so far developed in respect of the interpretation of public function under section 6(3)(b) of the Act, and concludes that the courts are failing to give effect to the intention of Parliament that the protection offered by the Act should be comprehensive.

The report examines the potential consequences of this failure, and finds them sufficiently serious to warrant early action to remedy this defect.

It considers alternative approaches to closing the gap in protection which has been opened, and to reducing the potential for further loss of protection. It concludes that most options for amending the provisions of the Act in an effort to reassert Parliament’s original intention carry too many risks of further unintended consequences.

It also concludes that although the use of contractual terms to remedy the defect holds out some promise, it is likely to result in further unjustifiable discrepancies in the protection afforded under the Act to different people and classes of people.

The Committee concludes that there is a fundamental problem not with the design of the law, but with its inconsistent and restrictive application by the courts. The Committee notes the judgement of the House of Lords in the only case it has so far determined on this matter, which balances a narrow category of “pure” public authority against a generously wide and flexible category of “functional” public authority. This diverges from the approach adopted by the lower courts in other cases. The Committee welcomes the approach adopted by the House of Lords, and concludes that the courts should be adopting a clear “functional” approach to the interpretation of section 6(3)(b) of the Act.

Introduction

Bringing rights home

1. The Human Rights Act 1998 (the “HRA”) was intended to make the exercise of public power more fully accountable against standards of fundamental human rights and to provide effective remedies in UK courts for breaches of human rights. The UK Government had long had obligations to comply with the European Convention on Human Rights (ECHR) and with the judgments of the European Court of Human Rights (ECtHR): but where previously a person’s human rights could be vindicated only by a relatively inaccessible international court, the Human Rights Act set out to “bring rights home” and to make the rights imported from the Convention an intrinsic part of national law.

2. Section 6 of the Act¹ made it unlawful for public authorities in this country to act in breach of the fundamental rights and freedoms set out in the European Convention on Human Rights, and section 7 created a new mechanism for individuals to vindicate their rights by bringing an action in the United Kingdom courts. Alongside creating that statutory accountability, it was hoped that the Act would also help to make those standards intrinsic to the way central government and other public services were delivered, by laying the foundations for the establishment of a “culture of respect for human rights”.²

Two types of public authority

3. The intention of Parliament was that a wide range of bodies performing public functions would fall within the obligation under section 6 to act in a manner compatible with the “Convention rights” established under the Act.

4. However, while the Convention had been designed to protect the individual from abuse of power by the State, the Human Rights Act was enacted at a time when the map of the public sector had been redrawn, as privatisation and contracting-out had, over several decades, increased the role of the private and voluntary sectors in the provision of public services. This development was acknowledged and considered by those who drafted and debated the Act. In particular, it was clearly envisaged that the Act would apply beyond activities undertaken by purely State bodies, to those functions performed on behalf of the State by private or voluntary sector bodies, acting under either statute or under contract. The Act was therefore designed to apply human rights guarantees beyond the obvious governmental bodies. Section 6 identified two distinct categories of “public authorities” which would have a duty to comply with the Convention rights.

5. First, under section 6(3)(a), “pure” public authorities (such as government departments, local authorities, or the police) are required to comply with Convention rights in all their activities, both when discharging intrinsically public functions and also when performing functions which could be done by any private body. So, for example, a local authority must

1 See annex p. 56.

2 See for example our Sixth Report of Session 2002-03, *The Case for a Human Rights Commission*, HL Paper 67-I/HC 489-I, Summary, pp 5–7 and pp 15–21.

as a pure public authority comply with the non-discrimination standards imposed by Article 14 of the Convention not only in its provision of public housing but also in its dealings with building contractors.³

6. Second, under section 6(3)(b), those who exercise some public functions but are not “pure” public authorities are required to comply with Convention human rights when they are exercising a “function of a public nature” but not when doing something where the nature of the act is private (section 6(5)). So, for example, a private security firm would be required to comply with Convention rights in its running of a prison, but not in its provision of security to a supermarket. These bodies to which section 6(3)(b) applies have been termed “hybrid” or “functional” public authorities.

7. The term “hybrid” public authority is unhelpful—it is not the *intrinsic* nature of these bodies which brings them within the ambit of the Act, it is the nature of the *functions* they perform which is determinative. A body could be liable under the Act one day while delivering functions under contract to a “pure” public authority; the next day, if the contract had ended, it might become again a purely private body without any alteration to its intrinsic nature. In the remainder of this report we will use the term “functional public authority” to refer to a body to which section 6(3)(b) of the Act might apply.

The problem

8. Only those bodies which fall within either of these categories (“pure” or “functional” public authorities) have a *direct* obligation under the Act to comply with Convention rights.⁴ The meaning of “public authority” is therefore crucial to securing comprehensive human rights protection.

9. The Act was intended to be comprehensive in providing effective protection of the rights of individuals and effective redress for those whose rights had been breached. But, since the Act came into force in October 2000, a number of court decisions have applied a restrictive definition of public authority under section 6(3)(b) of the Act, which would exclude many service providers from the provision of section 6(1) which makes it “unlawful for a public authority to act in a way which is incompatible with a Convention right”. The consequence would be to exclude many of those receiving those services from the Act’s protection. The problem is not one that matters solely in relation to litigation—we have also found evidence of a lack of understanding on the part of some public authorities of their status, and their concomitant obligations and responsibilities.

10. The law on the meaning of public authority continues to be the subject of judicial development. Nevertheless, we are convinced that the problems disclosed by the judicial application of the Act to date are sufficiently significant to need serious and urgent attention, not only by the courts, but also by both government and Parliament.

11. In this report, we examine the development of the law on the meaning of “public authority” under section 6 of the Human Rights Act, consider how it may affect protection

3 Courts and tribunals are specifically stated to be public authorities (in all their activities) under section 6(3)(a).

4 We discuss the extent of indirect obligations later in this report; see paragraphs 86–88.

of human rights within the UK, and assess the measures that might be taken to address the problems we identify.

Acknowledgements

12. We received written evidence from a wide range of organisations and individuals, representing both the providers and the recipients of public services, as well as from lawyers and academics with an interest in the development of human rights law. It is published with this report.⁵ We also heard oral evidence from the Secretary of State for Constitutional Affairs, Lord Falconer of Thoroton.⁶ We are grateful to all those who helped us in our deliberations.

⁵ See list of written evidence, p. 58.

⁶ See Minutes of Evidence taken before the Joint Committee on Human Rights, 8 December 2003, HL Paper 45, HC 106-i.

1 The developing law

Summary

13. In this section, we examine how the law on the meaning of public authority has developed since 2 October 2000, when the Human Rights Act came into force. We begin by considering the extent to which the ECHR and the jurisprudence of the Strasbourg Court allow the UK to be held to account under the Convention for the actions of non-State bodies performing public functions. We examine, in the light of these considerations, how the promoters and supporters of the Human Rights Bill envisaged the scope of the category of public authority when what became section 6 of the Act was being debated in Parliament. We then examine each of the key cases in which the higher courts have so far interpreted and applied the public authority provisions of the Act, and analyse the resulting state of the law. We conclude that it is unsatisfactory.

Public authorities and international human rights obligations

14. Our starting point is the international human rights obligations which the Act is designed to “bring home”. Two provisions of the Convention are not included in the Human Rights Act for the reason that the Act as a whole is designed to protect them. These are: the State’s obligation to secure the Convention rights and freedoms to everyone within its jurisdiction, under Article 1; and the obligation to ensure an effective remedy for breaches of Convention rights, under Article 13. These two Articles taken together require a State to have mechanisms in place to ensure that everyone’s Convention rights are actively protected, and that anyone can obtain redress where those rights are breached. In the debates on the Bill, the then Home Secretary stated—

The principle of bringing rights home suggested that liability in domestic proceedings should lie with bodies in respect of whose actions the UK Government were responsible in Strasbourg.⁷

15. It is well established in the Strasbourg jurisprudence (to which the UK courts are required, under section 3 of the Act, to have regard) that the State cannot evade its responsibility to safeguard Convention rights by delegation to private bodies or individuals.⁸ Where the State relies on private organisations to perform essential public functions, in particular those necessary for the protection of Convention rights (such as provision of legal aid⁹ or of primary education¹⁰), it retains responsibility for any breach of the Convention that arises from the actions of those private organisations.¹¹ This principle

⁷ HC Deb, 17 June 1998, col 406.

⁸ *Van der Musselle v Belgium* (1983) 6 EHRR 163; *Costello-Roberts v UK* (1993) 19 EHRR 112.

⁹ *Van der Musselle v Belgium*, *op cit*.

¹⁰ *Costello-Roberts v UK*, *op cit*.

¹¹ The State is also responsible for violations of Convention rights by private parties as a result of the inadequacy of domestic legislation: *Young James and Webster v UK* (2000) 29 EHRR 38, where the ECtHR found it unnecessary to decide whether the activities of British Rail engaged the responsibility of the State; similarly in *Hilton v UK* 57 DR 108 the Commission of Human Rights found it unnecessary to decide whether the BBC engaged State responsibility.

is also established under other international human rights instruments to which the UK is party, including the International Covenant on Civil and Political Rights (ICCPR).¹²

16. The doctrine of positive obligations is a central principle of ECHR law, which also forms part of the international context in which the meaning of public authority is to be considered. Positive obligations go beyond a duty not to interfere with Convention rights, and require that, in some circumstances, the state must take active steps to protect people's rights against interference by others. This principle arises in part from Article 1 of the ECHR, and its requirement that states "secure" the Convention rights to all within their jurisdiction. For example, under Article 2, the right to life, the State is required to take reasonable steps to protect the life of those whom they know or ought to know are at risk.¹³ This is relevant, for example, in healthcare or care home settings.

17. The right to non-discrimination in the enjoyment of Convention rights, protected by Article 14, is also relevant. Article 14 protects against unjustifiable discrimination in relation to the other Convention rights, whatever the grounds of that discrimination. Where, for example, there was found to be unjustifiable discrimination in the guarantee of Article 8 rights to respect for private life as between different local authority areas, Article 14 would be breached.

Public authorities under the Human Rights Act: the parliamentary debates

18. Ministerial statements during debates on the Human Rights Bill indicated that the purpose of the "public function" test under section 6(3)(b) was to make the Act comprehensive rather than restrictive in its application, in accordance with the principle that delegation did not absolve the State of responsibility. The then Lord Chancellor, Lord Irvine of Lairg, noted that the drafting of the relevant provisions was designed to "provide as much protection as possible for the rights of the individual against the misuse of power by the State".¹⁴ There was a deliberate and considered decision to reject a more prescriptive approach and list those bodies subject to responsibilities under the Act.¹⁵ Such an approach was recognised as potentially limiting the access to remedy of the citizen in ways which might be incompatible with Article 13.

19. Statements by the then Home Secretary and the then Lord Chancellor in the parliamentary debates in both Houses made it clear that privatised or contracted-out public services were intended to be brought within the scope of the Act by the "public function" provision. It was also made clear that the Government intended the provisions of

¹² See for example the concluding observations of the UN Human Rights Committee on the fourth report of the United Kingdom, 27/07/95, CCPR/C/79/Add.55:

"The Committee is concerned that the practice of the State party in contracting out to the private commercial sector core State activities which involve the use of force and the detention of persons weakens the protection of rights under the Covenant. The Committee stresses that the State party remains responsible in all circumstances for adherence to all articles of the Covenant."

¹³ *Osman v UK* (2001) 29 EHRR 245.

¹⁴ HL Deb, 24 November 1997, col 808.

¹⁵ In contrast, for example, to the approach taken in the Race Relations (Amendment) Act 2000, the Freedom of Information Act 2000, and the equality provisions in the Northern Ireland Act 1998 (see further paragraphs 99–105 below).

the Act to be adaptable to the changing structures of public realm, and to changes in the distribution of power and responsibility for factors affecting individual rights—

The Government have a direct responsibility for core bodies, such as central Government and the police, but they also have a responsibility for other public authorities, in so far as the actions of such authorities impinge on private individuals. The Bill had to have a definition ... that went at least as wide and took account of the fact that, over the past 20 years, an increasingly large number of private bodies, such as companies and charities, have come to exercise public functions that were previously exercised by public authorities.¹⁶

Railtrack acts privately in its functions as a commercial property developer. We were anxious that we should not catch the commercial activities of Railtrack or, for example, of the water companies, which were nothing whatever to do with its exercise of public functions. Private security firms contract to run prisons: what Group 4, for example, does as a plc contracting with other bodies is nothing whatever to do with the state, but, plainly where it runs a prison, it may be acting in the shoes of the state.¹⁷

A private security company would be exercising public functions in relation to the management of a contracted-out prison but would be acting privately when, for example, guarding commercial premises. Doctors in general practice would be public authorities in relation to their National Health Service functions, but not in relation to their private patients.¹⁸

For example, charities that operate ... in the area of homelessness, no doubt do exercise public functions. The NSPCC, for example, exercises statutory functions which are of a public nature, although it is a charity.¹⁹

20. It was left to the courts to interpret the legislation to determine exactly where the lines between public and private functions should be drawn. It is quite clear that Parliament envisaged that the scope of section 6(3)(b) should be based primarily on the nature of the function being performed by a private body, rather than the intrinsic nature of the body itself. In a key statement the Home Secretary explained—

As we are dealing with public functions and with an evolving situation, we believe that the test must relate to the substance and nature of the act, not to the form and legal personality.²⁰

Public authorities under the Human Rights Act: interpretation in the Courts

21. We now summarise the relevant case law in decisions made by the courts on the application of the provisions of section 6 to “pure” and “functional” public authorities.

16 Home Secretary, HC Deb, 16 February 1998, col 773.

17 Home Secretary, HC Deb, 17 June 1998, cols 409-410.

18 Lord Chancellor, HL Deb, 24 November 1997, col 811.

19 Lord Chancellor, HL Deb, 24 November 1997, col 800.

20 Home Secretary, HC Deb, 17 June 1998, col 433.

“Pure” public authorities

22. The classification of “pure” public authorities has been discussed in detail in only one case to date: *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*.²¹ The House of Lords held that a parochial church council was not a pure public authority.²² The PCC’s basis in legislation²³ and the fact that it was capable of exercising statutory powers were not sufficient to ensure it pure public authority status. It was also significant that, in practice, the function of the PCC was not governmental; it was concerned with the administration of church affairs. Neither was the PCC’s forming part of the established church determinative: it was held that, despite the particular recognition which establishment afforded, the Church of England remained an essentially religious rather than governmental organisation. It was also relevant that the PCC received no public funding, and that its statutory powers were enforceable only against a very specific category of persons.

23. The House of Lords’ judgement stressed that, in accordance with the European Convention on Human Rights, the purpose of placing responsibility on public authorities under section 6 was to secure Convention rights to everyone within the jurisdiction and to provide an effective remedy where they were breached.²⁴ In interpreting the category of pure public authority, the House of Lords also considered it relevant that, in Strasbourg, public authorities could not enforce their own Convention rights under Article 34, since only individuals and “non-governmental organisations” could bring a claim for breach of their rights.²⁵ We doubt whether this is right as a matter of principle and would hope that Strasbourg jurisprudence will come to recognise that there are circumstances in which public authorities have Convention rights. However, in the House of Lords’ view, were organisations of the Church of England to be considered as public authorities for all purposes (pure public authorities) this would lead to the anomalous consequence that they could not enforce their Article 9 rights to freedom of belief, despite the special protection given to the Article 9 rights of religious organisations in section 13 of the Human Rights Act.²⁶ They held therefore that the category of pure public authority should be interpreted so as to ensure that victims’ ability to enforce their Convention rights was not restricted.

“Functional” public authorities

24. Defining limits to the category of “functional” public authorities, which are required to comply with Convention rights under section 6(3)(b) where they are exercising “public functions” has proved more difficult and controversial. Having first rejected the argument that the PCC was a pure public authority, the House of Lords in the *Aston Cantlow*²⁷ case

21 In this case, a Parochial Church Council was seeking to enforce its statutory powers to require the lay owners of former parish property to repair the parish church. The defendants, the owners of the property, alleged an infringement of their property rights under the Human Rights Act (Article 1, Protocol 1 ECHR).

22 Appellate Committee of the House of Lords [2003] UKHL 37, overturning a decision of the Court of Appeal [2001] ECA Civ 713.

23 The Parochial Church Councils (Powers) Measure 1956.

24 Appellate Committee of the House of Lords [2003] UKHL 37, Lord Hope para.44 [of the HL judgment] referring to the State’s obligations under Articles 1 and 13 ECHR.

25 *The Holy Monasteries v Greece*, (1995) 20 EHRR 1; *Hautaniemi v Sweden*, Application No. 24019/94, 11 April 1996..

26 Ev 57.

27 Appellate Committee of the House of Lords [2003] UKHL 37.

rejected the argument that a Parochial Church Council enforcing a statutory obligation to repair the chancel of a parish church was performing a public function under section 6(3)(b). It held that, in enforcing its statutory powers in this case, the PCC was essentially acting as a private party enforcing a civil liability.

25. However, the House of Lords stressed that it was the nature of the *function* being performed that should determine whether a body was a functional public authority.²⁸ Lord Nicholls of Birkenhead considered that there should be a “generously wide” interpretation of “public function” so as to further the statutory aim of promoting human rights protection, whilst still allowing functional bodies to rely on the Convention rights themselves where they acted privately.²⁹ In determining what was a “public function”, there could be “no single test of universal application ... given the diverse nature of governmental functions and the variety of means by which these functions are discharged today”.³⁰ Lord Hope of Craighead noted that, in contrast to the category of “pure” public authority, the section 6(3)(b) category of “functional” public authority—

... has a much wider reach, and is sensitive to the facts of each case. It is the function that the person is performing that is determinative of the question whether it is, for the purposes of the case, a “hybrid” public authority.³¹

The obligation under Article 13 ECHR to secure Convention rights to everyone in the territory was, in Lord Hope’s view, “crucial” to the interpretation of the meaning of public authority under section 6.³²

26. The House of Lords, therefore, favoured a relatively narrow test for “pure” public authority status, but balanced this against a correspondingly wide and flexible category of “functional” public authority. In contrast to this decision, as well as to the tenor of the debates in Parliament and the clearly expressed expectation of Ministers, the broad, functional approach to public authority responsibility under the Human Rights Act has not so far found favour in the lower courts. In the relatively few decided cases, the courts have, in their application of section 6, taken as their starting point the amenability to judicial review of a body discharging a function, and have looked to the identity of the body, and its links with the State, as well as to the nature of the function performed.

27. This is particularly the case as regards application of the definition to private sector providers of public services. The fully privatised public utilities such as the water companies are established in the case law as “functional” public authorities, performing public functions in their delivery of services.³³ By contrast, the application of section 6(3)(b) to smaller private or charitable organisations, often providing services under contract from local authorities, has been less clear-cut. The case law has considered the

28 *ibid.*, Lord Hope, para. 41.

29 *ibid.*, Lord Nicholls, para. 11.

30 *Ibid.*, para. 12.

31 *Ibid.*, Lord Hope, para. 41.

32 *Ibid.*, para. 44.

33 *Marcic v Thames Water* [2002] EWCA Civ 65.

public authority status of organisations including housing associations,³⁴ care homes,³⁵ mental health care facilities³⁶ and organisations managing public markets.³⁷

Poplar Housing

28. The first case to consider in detail the application of the functional public authority definition was *Poplar Housing and Regeneration Community Association v Donoghue*.³⁸ In this judgement a housing authority providing rented accommodation on behalf of a local authority was held in performing that function to fall within the ambit of section 6(3)(b) of the Human Rights Act.

29. However, in *Poplar Housing* the court rejected a functional approach to the application of section 6(3)(b) and set down the general principle that “the fact that a body performs an activity which otherwise a public body would be under a duty to perform cannot mean that such performance is necessarily a public function”. It found a number of other factors to be relevant to reaching the conclusion that the Human Rights Act applied, including:

- statutory authority;
- control by the State; and
- proximity of the relationship between the private body and the delegating public authority.

30. It was the third factor which was decisive in the case. On the facts, the Court found that the Housing Association was so “enmeshed” in the activities of the local authority—members of the local authority sat on its governing board for example, and it was subject to guidance issued by the local authority—that it was a functional public authority with responsibilities under section 6(3)(b).

Leonard Cheshire Foundation

31. In the second case to deal with section 6(3)(b), *Callin, Heather and Ward v Leonard Cheshire Foundation*,³⁹ residents of a care home wished to challenge the decision to close the home and disperse the residents elsewhere. The home was run by a private charitable organisation, but the claimants’ places there were funded by their local authority, under the National Assistance Act 1948, as amended. It was argued that the decision to close the

34 *Poplar Housing and Regeneration Community Association v Donoghue* [2001] EWCA Civ 595, Jill Morgan, ‘The Alchemists’ Search for the Philosophers’ Stone: The Status of Registered Social Landlords under the Human Rights Act’ (2003) 66 MLR 700–725.

35 *Callin and Others v Leonard Cheshire Foundation*, [2002] EWCA Civ 595.

36 *R(A) v Partnerships in Care Ltd* [2002] 1 WLR 2610.

37 *R v Hampshire Farmers’ Market, ex parte Beer* [2003] EWCA Civ 1056. See also *R (Haggerty) v St Helen’s Council*, [2003] EWHC 803 (Admin), where Silber J assumed, without however finding it necessary to decide the issue, that the defendant council was liable for any breach of Convention rights resulting from contractual negotiations with a private care home which resulted in the home’s closure; and *Rubython v Federation Internationale de L’Automobile*, 6 March 2003, where Gray J considered that the defendant governing sports body was not a pure public authority, and that it was not exercising a public function in deciding on grants of press accreditation at a sports event.

38 [2001] EWCA Civ 595.

39 [2002] EWCA Civ 366.

home breached the claimants' right to respect for the home under Article 8, but the case turned on whether the care home was a functional public authority under section 6(3)(b).

32. The Court of Appeal held that section 6(3)(b) did not apply to the managers of the care home. It noted that there was no material distinction between the services the care home provided for residents funded by the local authority and those it provided to residents funded privately. Furthermore, although the Foundation was performing functions delegated under statutory authority, it was not itself exercising statutory powers. The Foundation was therefore held not to be "enmeshed" in the activities of the local authority in the same way that Poplar Homes had been.

33. The Court did suggest that contractual arrangements between the delegating public authority and the private service provider could include requirements to comply with Convention rights, and that these provisions could be relied upon by the local authority and, it was suggested, possibly by clients of the private service provider. The Court also considered that the local authority retained its obligation under Article 8, regardless of its delegation to the Foundation.⁴⁰

Partnerships in Care Ltd

34. A private provider of mental health care was held to be a functional public authority, performing public functions within the meaning of section 6(3)(b), in *R (A) v Partnerships in Care Ltd*.⁴¹ The claimant required treatment for a severe personality disorder. She was cared for in a privately run hospital where her care (and that of all the other patients on her ward) was financed by her health authority. The hospital where she was accommodated decided that they would no longer provide the specialist psychiatric services the defendant required. She was not provided with an alternative placement, and she claimed a breach of her Convention rights.

35. In this case the court emphasised the public nature of the function being performed, noting that Health Authorities had statutory power to contract out their health service provision functions to private bodies.⁴² The hospital was authorised under the Mental Health Act 1983 to receive patients, like the claimant, ordered to be detained under the Act. Admission to and treatment at the hospital were governed by this statutory regime. The court attached particular significance to the element of compulsion involved in the detention powers, and the importance of the statutory function which had devolved on the defendants, in reaching a determination of the meaning of "public function". Neither the absence of "enmeshing" with a State body, nor the absence of direct statutory authority, prevented the hospital from being considered a functional public authority when it was performing these important public functions.

40 The liability of the delegating authority is further considered in section 3 below, and the protection that could be offered through contractual arrangements is considered in section 6 of this report.

41 [2002] 1 WLR 2610.

42 Under the National Health Service Act 1977, as amended.

Hampshire Farmers Market

36. These decisions preceded the House of Lords decision in *Aston Cantlow*. That decision was, however, considered in *R v Hampshire Farmers Market ex parte Beer*,⁴³ where the Court of Appeal appeared to restrict the “generous” functional approach of *Aston Cantlow* perhaps in part because, as Dyson J noted in his judgment, the House of Lords in *Aston Cantlow* had not expressly overruled the *Poplar* and *Leonard Cheshire* cases.⁴⁴

37. In *Hampshire Farmer’s Market*, a farmers’ market had initially been established by Hampshire County Council, which had then set up a private company, HMFL, to run the market. County Council staff had provided assistance in the establishment and development of HMFL, and one of the County Council managers was appointed a director. Proceedings were brought in judicial review and under the Human Rights Act by a farmer who had been excluded from participation in the market.

38. The Court of Appeal held that the company was both amenable to judicial review, and a functional public authority performing a public function under the Human Rights Act. Dyson J suggested that these two issues would march hand in hand, except where Strasbourg case law required a departure from the test of amenability to judicial review. The Court considered that Hampshire Farmers’ Market was a functional public authority for two broad reasons. The first related to function: the power to control the right of access to a public market had a “public element or flavour”.⁴⁵ The second related to the institutional relationship with Hampshire County Council. The fact that HMFL owed its existence to the County Council, that it performed functions that had formerly been discharged by the Council, and that HMFL had been assisted in its work by the County Council, reinforced the conclusion that it was performing a public function.

Summary of the current state of the law

39. It seems therefore that the courts are likely to interpret the category of “pure” public authority (all of the actions of which would be required to be compatible with the Convention rights) narrowly. In particular, the courts consider that they must exclude bodies capable of enforcing their Convention rights. But when it comes to interpreting the definition of a “functional” public authority, which can be held to account under the Human Rights Act only in respect of its “public” functions, it is not clear that the approach of the House of Lords in *Aston Cantlow*, which stressed the importance of analysing the character of the function concerned rather than the character of the institutional arrangements of the body performing the function, is being applied in the lower courts. This may be because the clear principles set out by the House of Lords were stated without reference to, and without express disapproval or overruling of, the earlier cases—including *Poplar Homes* and *Leonard Cheshire*, which took a predominantly “institutional” rather than “functional” approach to the question.

43 [2003] EWCA Civ 1056.

44 *ibid.*, para. 15.

45 [2003] EWCA Civ 1056, para. 30.

40. The consequence is that, as the law presently stands, a private body is likely to be held to be a public authority performing public functions (a “functional” public authority) under section 6(3)(b) if:

- its structures and work are closely linked with the delegating or contracting out State body; or
- it is exercising powers of a public nature directly assigned to it by statute; or
- it is exercising coercive powers devolved from the State.

Beyond these categories, whether the courts will find that a body falls within section 6(3)(b) remains extremely uncertain. Factors such as:

- the fact of delegation from a State body,
- the fact of supervision by a State regulatory body,
- public funding,
- the public interest in the functions being performed, or
- motivation of serving the public interest, rather than profit,

are not in themselves likely to establish public authority status, though they may have some cumulative effect, indicating that the function performed has a “public flavour”. But the courts are reluctant to rely on a vague notion of public-ness alone. Where there are no direct statutory powers, therefore, or where the functions exercised are not within a narrow range of incontrovertibly governmental powers (such as powers of detention), institutional connection with government will be likely to be the indication of section 6(3)(b) status found to be most significant.

A gap in human rights protection?

41. **The tests being applied by the courts to determine whether a function is a “public function” within the meaning of section 6(3)(b) of the Human Rights Act are, in human rights terms, highly problematic. Their application results in many instances where an organisation “stands in the shoes of the State” and yet does not have responsibilities under the Human Rights Act. It means that the protection of human rights is dependent not on the type of power being exercised, nor on its capacity to interfere with human rights, but on the relatively arbitrary (in human rights terms) criterion of the body’s administrative links with institutions of the State. The European Convention on Human Rights provides no basis for such a limitation, which calls into question the capacity of the Human Rights Act to bring rights home to the full extent envisaged by those who designed, debated and agreed the Act.**

42. In our view, the principles set out by Lord Hope of Craighead in *Aston Cantlow* (cited in paragraph 25 above) would provide an effective basis for protection of the Convention rights. Although the House of Lords in that case did not expressly overrule the decisions in *Poplar* and in *Leonard Cheshire*, it appears that the principles set out by Lord Hope in *Aston Cantlow* are at odds with those earlier decisions of the lower courts. In our view, the approach in *Aston Cantlow* is to be preferred.

43. We asked the Secretary of State for Constitutional Affairs whether he considered the current legal position to be unsatisfactory. He expressed some concern at the way the law was developing but noted—

It is early days. I can fully understand why some people believe that the words “public authority” have been drawn too narrowly, compared with what was said at the time. All I can say at this stage is that I shall keep this concern under close review, and will pay particular attention to the need to intervene in future cases on the meaning of section 6(3)(b).⁴⁶

We welcome the undertaking to pay attention to the need to intervene in future cases, but in our view the Secretary of State’s approach to this problem is too phlegmatic. **A serious gap has opened in the protection which the Human Rights Act was intended to offer, and a more vigorous approach to re-establishing the proper ambit of the Act needs to be pursued.**

44. **This is not just a theoretical legal problem. The development of the case law has significant and immediate practical implications.** In the next chapter, we consider what this may mean in practice.

46 Minutes of Evidence taken before the Joint Committee on Human Rights, 8 December 2003, HL Paper 45, HC 106-i, Q 99.

2 Why does the meaning of “public authority” matter?

Uncertain rights and responsibilities

45. Why does this uncertainty about the application of the Human Rights Act matter to anyone except lawyers? The meaning of “public authority” matters because, given the limitations on and uncertainty as to the scope of the category of “functional” public authorities, much of the new accountability the Human Rights Act brings to the delivery of public services may be undermined almost from its inception.

46. The implications of the meaning accorded to “public authority” by the courts under the Human Rights Act are not confined to public services. It is important to churches and religious groups in respect of their freedoms under Article 9 of the Convention.⁴⁷ Regulators, or organisations holding or processing sensitive data, to take a few examples, may also have an uncertain status under section 6, with significant practical consequences for those whose Convention rights are affected by their activity. Whether or in what circumstances arbitrators or adjudicators may be considered to be public authorities has significant consequences for their work.⁴⁸

47. However, it is the problem, created by the case law, of lack of certainty for both providers and recipients of public services as to their respective rights and obligations under the Human Rights Act, that most concerns us in this report. This problem was highlighted in the evidence of both the British Institute of Human Rights⁴⁹ and the Charity Commission,⁵⁰ the latter stressing the difficulties for charities in assessing whether and when their work was affected by the Human Rights Act. It is clearly unsatisfactory that private and voluntary sector organisations should enter into contracts to provide essential public services without knowledge or consideration of whether they are responsible for protecting fundamental human rights. Equally unsatisfactory is uncertainty amongst delegating state bodies as to the responsibilities they themselves retain where a contracted out service breaches Convention rights.

48. It is not, therefore, just the damage done to the enforcement and redress mechanisms of the Human Rights Act that matters. It is also the confusion about where responsibility lies for actively securing and promoting the underlying standards of human rights. As we have said elsewhere,⁵¹ the key to the effective protection of rights lies in creating a culture in public life in which these principles are seen as fundamental not just to the design of policy and legislation but also to the delivery public services. They provide an ethical and legal framework within which public authorities work. Shortly after the Act had been passed, the then Home Secretary expressed his belief that—

47 Ev 57.

48 *Austin Hall Building Ltd v Buckland Securities*, Technology and Construction Court, 11 /4/2001.

49 Ev 36.

50 Ev 17.

51 Joint Committee on Human Rights, Sixth Report of Session 2002-03, *The Case for a Human Rights Commission*, HL Paper 67-I, HC 489-I.

The Act points to an ethical bottom line for public authorities ... This ... should help build greater public confidence in our public authorities ...⁵²

The then Cabinet Secretary reflected that—

... initial thinking about the Human Rights Act has tended to concentrate on legal questions about compliance ... Though it is clearly right that all public authorities should not act incompatibly with the Convention rights, the Act was intended to do more than merely avoid direct violations of human rights ... It offers a framework for policy-making, for the resolution of problems across all branches of government and for improving the quality of public services.⁵³

49. The uncertainty created by the current state of the law undermines one of the key aims of the Human Rights Act—to “bring home” a culture of human rights to government and administration in the UK.⁵⁴ The Act, intended to be flexible and open-ended in an area where the enunciation and application of general principles is difficult and precision is likely to be arbitrary, has instead become confused in its application by the development of case law. **Those providing important public services, whether from the State or private sectors, should not be left uncertain about their responsibilities to protect fundamental human rights.** Our inquiry has indicated the significant practical impact of a restrictive public authority definition, in particular for the human rights protection available to vulnerable people.

The role of the “private” sector in delivering public services

50. The implications of this uncertainty are likely to be particularly significant for public services given the increased reliance on “private” bodies (from both the commercial and not-for-profit sectors) to provide services previously delivered by “public” bodies within central or local government.

51. In highlighting this issue, we do not seek to question or endorse the legitimacy of a policy of encouraging contracting-out of services. Under a broad definition of public authority, increased private sector involvement would have no consequences for the level of human rights protection available to the beneficiaries of public services. It is not reliance on the private or voluntary sector which risks undermining the individual’s recently-won human rights protection, but the failure of the law to adapt to the reality of the involvement of those sectors in the delivery of public services.

52 *Building on a Human Rights Culture*, Home Secretary Jack Straw address to Civil Service College, 9 December 1999.

53 See Minutes of evidence taken before the Committee on 21 March 2002, HL Paper (2001–02) 103-I, HC (2001–02) 719-i, Ev 5.

54 See for example the written evidence of the Office of the Rail Regulator to our inquiry into the case for a human rights commission: after an exchange of letters he wrote, “You are aware that I am concerned principally with the regulation of Railtrack’s stewardship of the national rail network. In this respect, Railtrack is not a public authority but a limited company, albeit currently in railway administration. However, I understand that while you consider that Railtrack is not a public authority when conducting private business with the train operating companies, you are inclined to think that it is a limited purpose public authority for the purpose of section 6 of the Human Rights Act 1998. You also say that when it is securing a safe rail network, it is discharging a statutory duty and may be bound by the positive obligations arising under article 2 of the European Convention on Human Rights ... Your letter is a timely reminder as to how we should proceed in the future. We shall be reviewing our processes in regard to the inclusion of human rights, particularly in terms of our licensing conditions and in the application of the Competition Act 1998.”, Twenty-second Report, Session 2001–02, *The Case for a Human Rights Commission: Interim Report*, HL Paper 160/HC 1142, pp. 243–4.

52. Although we have not engaged in any systematic research to assess the extent of the private sector's involvement in public service delivery, evidence to the inquiry emphasised the high level of reliance on the private sector in certain areas of service provision, in particular housing and social care. In relation to the housing sector, the Deputy Prime Minister noted that 200 tenant management organisations currently manage 84,000 local authority homes in England; and 337,000 English local authority owned homes are managed by Arms Length Management Organisations.⁵⁵ Over 1.7 million properties are owned or managed by Registered Social Landlords.⁵⁶ Shelter reported that nearly 50% of social housing is now out of LHA control, and suggested that this figure would continue to increase.⁵⁷ In relation to social care, the Department of Health noted that the independent sector provided 92% of care homes and 64% of contact hours of home care.⁵⁸ DIAL UK pointed to the large numbers of supported residents with mental health problems cared for in independent nursing homes (1600 in 2000).⁵⁹

53. The Department of Health also outlined the rather less dominant role of the private sector in children's services: it estimated that 15% of foster placements are arranged by private agencies, and that 20% of adoption placements are arranged by Voluntary Adoption Agencies. Evidence also noted that many hospices are also privately run (many by charitable organisations) and publicly funded and that, in the education sector, 100% publicly funded but privately run "city academies" are now being established.⁶⁰ In more than one local authority area private sector companies have taken over the functions of the local education authority. In the NHS, greater private sector involvement in healthcare provision seems likely. Other private sector organisations providing public services include Network Rail and the National Air Traffic Services.⁶¹

54. The arrangements for involvement of the private and voluntary sectors vary widely.⁶² Much private sector involvement takes place under specific statutory regimes; and some of it predates these regimes. For example, the involvement of Housing Associations in the provision of social housing dates back to the nineteenth century.⁶³ However the role of the private and voluntary sector in public housing has become increasingly significant since the 1980s,⁶⁴ backed up by a developing statutory scheme⁶⁵ that facilitated local authority delegation to Housing Associations, including full delegation of a local authority's housing

55 Ev 1.

56 Ibid.

57 Ev 29.

58 Ev 2.

59 Ev 18.

60 Ev 32.

61 Paul Maltby, *In the public interest? Assessing the potential for Public Interest Companies?* IPPR Report 2003.

62 Within central government, the Office of the Deputy Prime Minister co-ordinates and advises on PPP projects. In Local Government, an agency sponsored by the LGA, 4Ps, has been established to assist Local Authorities in developing PPP schemes. In addition, a body which is itself a PPP, Partnerships UK, established in 2001, works with government to develop policy on PPP, and provides financial, policy and management support to PPPs (Written evidence of Partnerships UK, Ev 13).

63 The Peabody Housing Trust was founded in 1862.

64 Paul Maltby, *op cit*.

65 Section 27 Housing Act 1985 as amended by the Regulatory Reform (Housing Management Agreements) Order 2003 governs arrangements between a local authority and an outside body for the management of housing. See Ev 1.

management functions by way of a Large Scale Voluntary Stock Transfer, and the establishment of Arms Length Management Organisations.⁶⁶

55. For some time, older people have been placed in private care homes: either by the social services authority, under the National Assistance Act 1948, part funded by the social services authority; or under section 3 of the National Health Service Act 1977, fully funded by the NHS; or to meet after care needs following mental health detention,⁶⁷ fully funded by the NHS.⁶⁸

56. Some services, such as water services, have been fully privatised. A more recent development, however, is the increased reliance on public-private partnerships (PPPs) to deliver public services of almost any kind. The broad notion of public-private partnership (PPP) includes the Private Finance Initiative (PFI), which principally involves private sector provision and maintenance of the physical assets (school and hospital buildings, etc) necessary for public services. In “Joint Venture PPPs” both the public authority and the private company may have a role in the governance of the joint venture company. This might involve representation on the board of the company and active participation in the business and key decisions relating to it. In arrangements under the Private Finance Initiative (PFIs), the “project agreement” with the public authority may specify only the outputs or levels of service by the private body but will not specify how this service is to be carried out; so that delivery of the service is effectively delegated, and the public authority retains no governance role.

57. In this report we are not principally concerned with PFI contracts, which tend to concern activities such as building construction which would not be considered public functions. The PPPs with which we are primarily concerned have been termed “Public Interest Companies” or “Not-for-profits”: non-shareholder private sector organisations of which the aim is to deliver public services. This term may encompass organisations including limited companies and trusts, ranging from housing associations to Network Rail.

58. The institutional arrangements for private sector involvement are therefore complex and varied, but the result for the individual user of public services is an increased reliance on non-State bodies for the delivery of services. **Given the range of private and voluntary sector involvement in public service provision, the extent of public authority responsibilities under the Human Rights Act is profoundly significant both to the providers and the recipients of these services.** Below we consider the practical consequences of wider or narrower descriptions of “public authority” under the Act.

Concerns of service providers

59. Some evidence from providers of public services raised concerns about the overlap between the problems raised by uncertainty over the application of the Human Rights Act in relation to the shifting nature of the public/private divide, and problems arising from public/private definitional issues seemingly unrelated to the application of the Act.

66 Paul Maltby, *op cit*.

67 Under section 117 Mental Health Act 1983.

68 Ev 24.

Independence from government

60. A number of submissions expressed concern that a wider meaning of public authority would jeopardise both the perceived and the actual status of organisations, such as housing associations, as independent of the government. In particular, they emphasised the need to preserve the administrative and financial independence of these non-governmental organisations. The Housing Corporation in its evidence asserted that—

... the sector is independent of the state in its origin, is responsible for its own performance and management, and ... the sector's effective operation and delivery of its purposes is contingent on preservation and promotion of its independence from the State.⁶⁹

61. Similarly the National Housing Federation feared that a wider definition of public authority would jeopardise the perception of Registered Social Landlords (RSLs) as independent bodies; and would endanger the contribution they could make to the implementation of government housing policy.⁷⁰ The Chartered Institute of Housing argued that bringing housing associations within the Human Rights Act would restrict their ability to make executive decisions.⁷¹

62. **We do not believe that identification as a functional public authority, that is, a private sector body that is performing a public function for the purposes of section 6 of the Human Rights Act, would jeopardise the independence from the state of a non-governmental body.** Functional public authority status should not imply that an organisation is institutionally connected with the State, nor need it require that the State exercise control over its management or operation. Rather, it acknowledges that the function being performed, or the service being provided, is public in nature, irrespective of the public or private status of the organisation involved.

63. We appreciate that the duty to comply with Convention human rights imposes restraints on the delivery of services by private sector providers. Those restraints are necessary and desirable, and are consistent with good practice in service delivery. However, compliance with these responsibilities may also impose a financial burden. The burden should not be excessive: where the application of the Act is established, the Convention rights themselves contain, to varying degrees, balances between essential public policy considerations and the rights of the individual, and the concept of proportionality is fundamental to the jurisprudence on rights. Within the application of this principled framework, considerations of the efficient working of essential services should be taken into account. Such concerns about the potential financial consequences are not grounds for the wholesale exclusion from the application of the Act of large categories of voluntary sector service providers who discharge public functions. Nevertheless, **in our view, the financial burden, responsibility and possible conflict with other duties, for example, under charity law, that public authority status may impose on a voluntary sector organisation needs to be taken into account by State bodies when they contract-out public functions.**

69 Ev 6.

70 Ev 10.

71 Ev 4.

Public sector borrowing and the private sector

64. There was particular concern amongst some private sector service providers that identification as a “public authority” under the Human Rights Act would, by redefining the organisations as public bodies in general terms, prevent them from raising money outside Treasury controls. Private finance raised by organisations such as housing associations is not counted as public sector borrowing.⁷² The success of Registered Social Landlords was seen as dependent on their ability to raise finance outside Treasury constraints, and the Chartered Institute of Housing argued that bodies such as housing associations “rely on private sector freedoms for their effectiveness”.

65. This line of argument seems to us wholly misconceived and without basis in law or public policy. Nonetheless, we put this concern to the Secretary of State for Constitutional Affairs, who agreed that it was highly unlikely that Human Rights Act public authority status should affect an organisation’s capacity to raise private finance.⁷³ In supplementary written evidence he confirmed this view.⁷⁴ Undoubtedly, were the allocation of functional public authority responsibility under the Human Rights Act to jeopardise capacity to raise private finance it would be a serious matter for the effectiveness of many organisations. However, there is no reason to deduce that recognising that an organisation in some of its activities fell within the ambit of section 6(3)(b) of the Act would have that consequence. The function in question might represent only a small part of an organisation’s wider activity, or it might be its main purpose. In either case, the application of section 6(3)(b) does not have any affect on the private law nature of other functions of the body. The organisation, irrespective of the proportion of its work that amounted to a public function, would remain essentially a private organisation. **In our view, it is irrelevant to deciding the application of the Act whether an organisation performing a public function is deemed to be within or without the public sector for wider, including financial, purposes.**

Consequences for individuals: the impact on vulnerable people

66. Given the significant role of the private and voluntary sector in public service provision, the extent of the ambit of public authority responsibilities under the Human Rights Act is likely to have significant impact across areas including housing, healthcare, care provision to the elderly and to people with disabilities, mental healthcare and children’s services. Provision of services in all of these areas regularly engages rights under Article 8 ECHR, including rights to respect for private life, family life and housing; the right to a fair hearing in the determination of civil rights and obligations under Article 6.1; freedom from discrimination in the enjoyment of other Convention rights under Article 14; and, in extreme cases, the right to freedom from inhuman and degrading treatment under Article 3. In some of these areas the right to life (Article 2), the right to liberty (Article 5) and the right to peaceful enjoyment of possessions (Article 1, Protocol 1) will also be engaged. Educational services also of course engage education rights under Article 2

72 Chartered Institute of Housing, Ev 4; Housing Corporation, Ev 6.

73 Minutes of Evidence taken before the Joint Committee on Human Rights, 8 December 2003, HL Paper 45, HC 106-I, Q 111.

74 Ev 3.

of Protocol 1. Research carried out by the British Institute of Human Rights, and discussed extensively in our report of March 2003 on *The Case for a Human Rights Commission*, also suggests that breaches of Convention human rights regularly occur in key areas of social service provision.⁷⁵

67. That research is supported by other evidence. DIAL stressed that disabled people in private care homes were vulnerable to breaches of their rights under Articles 2, 3, 8 and 14, all rights in respect of which they might have lesser protection under a narrow definition of public authority. Age Concern pointed to the serious consequences for older people unable to obtain human rights redress for private care home closures, and Help the Aged identified potential breaches of the Convention rights of older people in private care homes through inadequate medical care, home closures, physical and sexual abuse, and neglect, and the use of restraints. They argued that—

... the exclusion of private and voluntary sector care homes from the scope of the HRA will entirely preclude the possibility of recourse to the courts in relation to home closures and make it considerably more difficult and, in practice, impossible for many residents [in relation to the other problems identified].⁷⁶

68. Shelter pointed to the human rights issues that arose in the ordinary course of the management of social housing, in relation to housing allocation, transfers and evictions. It also pointed to the increasingly public nature of the private and voluntary housing sector's role in relation to crime and "anti-social behaviour": in particular the power of Housing Associations and Registered Social Landlords to issue ASBOs to their tenants.⁷⁷ It also drew attention to the provision under the new Anti-social Behaviour Act to require Registered Social Landlords to play a role in tackling anti-social behaviour, and to allow them extended powers in this regard, including powers to apply for injunctions, and remove the security of tenure of "anti-social" tenants. As we noted in our Report on the Anti-social Behaviour Bill,⁷⁸ these provisions would engage the right to a fair hearing in the determination of civil rights and obligations (Article 6.1); the right to respect for the home and private life (Article 8) and the right to peaceful enjoyment of possessions (Article 1, Protocol 1).

69. As the case law currently stands, whether human rights breaches by private and voluntary sector providers of public services will give rise to accountability under the Human Rights Act is likely to depend on a number of relatively arbitrary criteria.

70. For example, whether a resident of a care home can hold the home liable for breach of his Article 3 or Article 8 rights is likely to depend on the following factors:

⁷⁵ *Something for Everyone: The impact of the Human Rights Act and the need for a human rights commission*, British Institute of Human Rights, 10 December 2002. See also Joint Committee on Human Rights, Sixth Report, Session 2002–03, *op cit*.

⁷⁶ Ev 14.

⁷⁷ ASBOs were found not to be per se in breach Convention rights in *R v Manchester Crown Court, ex parte McCann* [2002] UKHL 39, but the imposition of individual ASBOs would still raise issues under Article 6.1 and Article 8 ECHR, and potentially under Article 14.

⁷⁸ Joint Committee on Human Rights, Thirteenth Report, Session 2002–2003, *Anti-social Behaviour Bill*, HL Paper 120, HC 766, para.12.

- whether the local authority concerned has a policy of providing services directly, or a policy of contracting out some or all services;
- within a local authority area where there is mixed provision, whether the resident has been allocated a place in a local authority or a private sector care home;
- whether the private sector home in question has sufficiently close institutional or administrative connections with the local authority to bring it within section 6(3)(b).

71. If no liability attaches under the above criteria, there may nevertheless be some human rights recourse against the home, dependent on:

- whether the local authority included human rights provisions in its contract with the care home, requiring that the care home respected Convention human rights in its work; or
- whether there is a contract between the care home and the resident which includes similar human rights clauses.

72. Similar anomalies likely to arise in the housing sector were indicated by Shelter, which points out that, since it is established that Registered Social Landlords are not subject to judicial review, then—

In the absence of Human Rights Act protection, tenants of RSLs and HAs have little protection against indiscriminate, unreasonable or disproportionate actions by their landlords.⁷⁹

Shelter draws particular attention to the importance of Human Rights Act protection in evictions under probationary tenancies granted by a Registered Social Landlord; and in relation to evictions for rent arrears of those with assured tenancies.⁸⁰ Human Rights Act protection for tenants may depend on the following:

- whether the local authority has exercised its statutory discretion to discharge its duties under the Housing Act through contracts with Registered Social Landlords (RSLs), or directly;
- whether a local authority has chosen to make a partial Large Scale Voluntary Transfer (LSVT) of housing stock to the private or voluntary sectors;
- where there has been such a transfer, whether the tenant was allocated housing before or after the transfer.

⁷⁹ Ev 29.

⁸⁰ Under Schedule 2 of the Housing Act 1988.

Conclusion

73. Disparities in human rights protection as between different local authority areas, or different recipients of services in the same local authority area, may raise issues under Article 14 ECHR, (freedom from discrimination) considered in conjunction with other Convention rights, including in conjunction with the right to an effective remedy under Article 13.⁸¹ **The gaps and inconsistencies in human rights protection arising from this situation are likely to mean that the UK falls short of its international obligations (under Articles 1 and 13 ECHR) to secure the effective protection of Convention rights and to provide an effective remedy for their breach.** In this situation, it is likely to be unclear to users of public services whether they can rely on Convention rights under the Human Rights Act, in some cases depriving them of the redress which was intended to be provided by the Act. It is also likely to be unclear to providers of public services whether they are under an obligation to uphold and secure Convention rights. Not only is the mechanism of redress provided by the Act being thwarted, the foundations on which a culture of respect for human rights should be being built are being undermined.

74. **The disparities in human rights protection that arise from the current case law on the meaning of public authority are unjust and without basis in human rights principles. Unless other avenues of redress can be found, this situation is likely to deprive individuals of redress for breaches of their substantive Convention rights incorporated under the Human Rights Act. The situation created by the current state of the law is unsatisfactory, unfair, and inconsistent with the intention of Parliament.**

81 Article 13, as noted above, is not incorporated in the HRA but binds the UK before the Strasbourg court.

3 Is the category of “functional public authority” necessary?

Summary

75. Before we turn to the potential solutions to the deficit in protection that we have identified, we examine two lines of argument suggesting that, even without the appropriate application of the provisions of section 6(3)(b) of the Human Rights Act, there are sufficient avenues for redress open to those who are victims of breaches of their rights by public authorities.

76. The first is that sufficient Convention rights protection already exists where services are contracted out, because the contracting public authority retains responsibility, as a pure public authority, for any violations of rights which occur in the exercise of the contracted-out functions by the private body it contracts with.

77. The second is that a narrow application of the functional public authority provisions of the Human Rights Act could be compensated for by the potential of other aspects of the Act to apply human rights to the private sector. It is considered how far the duty of the courts to interpret legislation compatibly with Convention rights under section 3 of the Act, and their duty under section 6 to act in accordance with Convention rights, have the potential to protect Convention rights even where a private organisation is found not to be directly accountable under the Human Rights Act.

Accountability of the delegating public authority?

78. Where a public authority contracts out functions which it would otherwise discharge itself,⁸² it is arguable that the public authority itself remains liable under the Human Rights Act for any breach of Convention rights that results. This argument is relied on by the Department of Health: it argued that, where social services are contracted out—

The local authority does not “delegate” its functions. It exercises its functions by entering into contracts for the provision of services. It remains accountable for those functions. It continues to be responsible for providing the services needed by the person and for reviewing his needs. Therefore we believe that people’s rights are adequately protected by the existing legislative structure.⁸³

79. The Deputy Prime Minister takes a similar view in relation to the role of private sector organisations in the housing sector. He points out that, under section 27 of the Housing Act 1985 as amended by the Regulatory Reform (Housing Management Agreements) Order 2003, where there is an agreement for private sector organisations to provide housing management services for a local authority, the local authority remains responsible for anything done, or not done, by the private sector organisation.⁸⁴

⁸² As for example in the *Poplar* and *Leonard Cheshire* cases.

⁸³ Ev 3.

⁸⁴ Also supported in the evidence of the Charity Commission, Ev 17; the Chartered Institute of Housing, Ev 4.

80. In his oral evidence, however, the Secretary of State for Constitutional Affairs took a more cautious view. Asked whether a contracting-out body would retain responsibility for violations of Convention rights in the delivery of the contracted-out services, he observed that—

... it would depend upon the facts of the individual case, but if the public body contracts out to a private organisation and that private organisation is not held to be a public authority a question could then arise about the public authority's liability. That would depend on all of the circumstances, including what arrangements were made between the public and private body, and what was known to the public body at the relevant time.⁸⁵

81. It has been suggested by the courts, though it has not yet been clearly decided, that where a public body contracts out its functions it retains responsibility for any action by the private body in performing those functions in breach of Convention rights. In *Poplar Housing*, the Court of Appeal relied on *Costello Roberts v United Kingdom*⁸⁶ to support a retention of human rights liability by a contracting-out public body—

The European Court made it clear that the State cannot absolve itself of its Convention obligations by delegating the fulfilment of such obligations to private bodies or individuals, including the headmaster of an independent school. However, if a local authority, in order to fulfil its duties, sent a child to a private school, the fact that it did this would not mean that the private school was performing public functions. The school would not be a hybrid body. It would remain a private body. The local authority would, however, not escape its duties by delegating the performance to the private school. If there were a breach of the Convention, then the responsibility would be that of the local authority and not that of the school.⁸⁷

This view was restated by the Court of Appeal in *Leonard Cheshire*,⁸⁸ the Court adding that—

... if the arrangements which the local authorities made with LCF had been made after the HRA came into force, then it would arguably be possible for a resident to require the local authority to enter into a contract with its provider which fully protected the residents' Article 8 rights ...⁸⁹

82. We acknowledge these *dicta*, and we discuss the use of contracts to ensure protection in section 7 below. But it should not in our view be taken for granted that a public authority that contracts out services remains liable in domestic law for *any* breach of Convention rights by the contracted-to body. This issue has not as yet been given full consideration by the UK courts. Undoubtedly the State retains liability before the Strasbourg Court for any breach of Convention rights arising from a contracted-out public service.⁹⁰ But the international law which the Strasbourg Court enforces, based on a system of State liability, should be distinguished from the domestic system for complying with the State's

85 Q 101.

86 [1993] 19 EHRR 112.

87 [2001] EWCA Civ 595, para. 60.

88 [2002] EWCA Civ 366, para. 33.

89 *Ibid.*, para 34.

90 see above paras.14–15.

obligations. As the parliamentary debates show,⁹¹ the Human Rights Act as a whole was designed to provide protection equivalent to the UK's obligations in Strasbourg. This was, however, to be effected by designing into the Act the direct liability of "pure" public authorities for breaches of Convention rights alongside direct liability, under section 6(3)(b), of private organisations performing public functions for breaches of Convention rights directly attributable to them.

83. In our view, therefore, a contracting-out public body would be liable for the actions of the contracted-to public body in breach of Convention rights only where it could be shown that the public body had a positive obligation to protect rights in the circumstances at issue. This would in general require that, where the State (in the form of a "pure" public authority) knows, or ought to know, of a real and immediate risk to the Convention rights of a particular individual or group, there is an obligation on it to take reasonable steps to prevent that breach.⁹² So, for example, where a local authority contracts-out provision of residential care to a private organisation, and it knows or ought to know that conditions at the care home would be in breach of Article 3 (the prohibition on inhuman and degrading treatment), then it would be likely to be in breach of its positive obligation to prevent breach of the residents' rights. However, where reasonable steps have been taken to ensure that services are contracted out to organisations that will not breach Convention rights, no positive obligation would arise. In those circumstances, in our view, there is no reason why the contracting-out public body would be liable under section 7 of the Human Rights Act for a breach of Convention rights by a contracted-to service provider.

84. In some cases, because of the nature of the breach at issue, the contracting-out public authority would simply not be in a position to afford effective redress. This, for example, was the position in the *Leonard Cheshire* case, where the claimants wished to use Article 8 of the ECHR to prevent the closure of their care home and their transfer elsewhere. The local authority, which had contracted with *Leonard Cheshire* for the applicant's care, could not itself have prevented this. The Law Society argues that there will be many cases—

... where a pure public authority cannot practically be made liable for the default of a notional hybrid [or "functional"] authority. Persons in this position might be termed "stranded victims", that is persons for whom the State has Convention responsibilities (under Article 1 ECHR) but where the Convention violation has been inflicted by a non-public body.⁹³

85. In our view, accountability of the contracting-out body for compliance with Convention rights by contractors (where and to the extent that it is available) is not an adequate substitute for direct accountability of the service provider under section 6. Reliance on the contracting-out party's responsibility will provide only partial protection. It is also undesirable that the body directly providing a service to individuals should be able

91 See the comments of the then Home Secretary Jack Straw MP cited at para.14 above.

92 *Osman v UK* (2000) 29 EHRR 245. Other aspects of a State's positive obligations under the Convention include the duty to provide resources necessary for the realisation of Convention rights (*Airey v UK* (1979-1980) 2 EHRR 277); to ensure that there is an effective legal framework for the protection of Convention rights (*X and Y v Netherlands* (1986) 8 EHRR 235); to provide information to individuals to allow them to ascertain whether their Convention rights are being breached, for example information on dangerous levels of environmental pollution (*Guerra v Italy* (1998) 26 EHRR 357); to investigate grave breaches of Convention rights, particularly breaches of Articles 2 and 3 (*Aydin v Turkey* (1998) 25 EHRR 251).

93 Ev 48.

to shift responsibility for human rights compliance elsewhere. **If a human rights culture is to be developed in our public administration and public services, this will not be promoted by removing from those delivering sensitive services the responsibility for compliance with, and the liability for breaches of, those human rights standards.**

Horizontal application: the protection of rights in the private sphere?

86. Although the Human Rights Act imposes direct obligations to protect Convention rights only on public authorities, the Act does allow the Convention rights to have some impact on the development of the law in the private sphere. The Act's limited horizontal effect arises from two provisions. First, under section 6, the courts as public authorities have a duty to protect Convention rights and therefore to apply the law, in all cases before them, in a way that complies with these rights. Second, the duty to interpret legislation compatibly with Convention rights "so far as is possible to do so", under section 3, also applies in all cases, including those involving purely private bodies.

87. The extent of the "horizontal" application of the Human Rights Act as between private parties has been the subject of extended academic debate,⁹⁴ but it is generally accepted that these provisions fall far short of full horizontal effect, which would apply the obligation to comply with Convention rights to both private and public persons on an equal basis. Nevertheless, it is arguable that in cases involving private sector service providers falling outside a narrow definition of public authority, there would be a sufficient level of human rights protection arising from the obligation of the courts to comply with Convention rights, and their obligation to interpret legislation in accordance with Convention rights. Private sector service providers are of course subject to the criminal law and to the full panoply of private law actions, including actions in tort or contract: this, interpreted in accordance with Convention rights by the courts, provides some protection for the rights of service users. Additionally, sectors such as housing and healthcare are regulated by legislation which has to be interpreted in accordance with Convention rights under section 3, so far as is possible to do so.

88. The principal difficulty with making this mechanism stand as a proxy for direct accountability is that even the limited "horizontal" applications of the Act are not free-standing. They depend on there being an existing cause of action to get the matter into court. Doughty Street Chambers note that indirect application under section 3 and section 6 is—

... of little practical benefit where a body performing privatised functions is neither a public authority nor amenable to judicial review ... the jurisdiction of the court will depend on there being some other cause of action upon which the court's role as a public authority can bite.⁹⁵

94 Murray Hunt, *The Horizontal Effect of the Human Rights Act*, [1998] Public Law 423; Sir William Wade, *Horizons of Horizontality* [2000] 116 LQR 217; Dawn Oliver, *The Human Rights Act and the public law / private law divide* [2000] EHRLR 343; Tom Raphael, *The problem of horizontal effect* [2000] EHRLR 393.

95 Kate Marcus, *What is Public Power: The Courts' Approach to the Public Authority Definition under the Human Rights Act*, in Jowell and Cooper, eds., *Delivering Rights: How the Human Rights Act is Working*, Hart Publishing, 2003. See also evidence of Liberty/Oxford Public Interest Lawyers, Ev 51.

In our view, the lack of a cause of action to bring a case to court would mean that in many cases “horizontal” application of Convention rights would be of little assistance to victims of a breach of Convention rights by a provider of a public service which was not a public authority. Section 6 of the Human Rights Act is the only legal mechanism available which ensures full responsibility for the protection of, and direct accountability for breaches of, Convention rights.

4 Potential Solutions: a summary

89. How then can the gap in human rights protection which we have identified best be addressed, and Parliament's original intentions be realised? In our call for evidence, we invited those who considered the current definition of public authority or its interpretation by the courts to be inadequate to suggest measures to address the problem. There are a number of options, which are considered in detail in the remainder of this report.

Amending the Act

90. Most radically, legislation could be introduced, either to amend or to supplement section 6 of the Human Rights Act, making clear that a range of organisations or functions, including functions in the provision of key public services, or organisations involved in the delivery of those services, have a responsibility to protect Convention rights. There are a number of possible models for such legislation, each of which we consider in detail below in section 5. Our conclusion is that such amending legislation would risk creating as many problems as it solves.

Contract

91. Second, it has been suggested, most notably by the Court of Appeal in the *Leonard Cheshire* case, that human rights could be protected under contract. Such terms could be inserted either in a contract between a State body and a private organisation for the provision of services, or in a contract between the private organisation and individual recipient of services. We examine how this might work in section 6 of this report below.

Guidance

92. Third, authoritative guidance as to law and best practice in assessing when an organisation is likely to be a public authority could assist both public authorities and the courts in clarifying responsibilities and improving human rights protection. Although there are significant drawbacks to reliance on contract alone, it could be useful to develop standard contractual terms to protect Convention rights. Whilst we welcome such guidance as has been already issued, and would welcome further guidance, we conclude in section 7 that it cannot provide a full or enduring solution to the problem we have identified.

Interpretation by the courts

93. Finally, the case law on the interpretation of "public authority" under section 6 of the Human Rights Act may develop along lines that provide for consistent human rights protection in the delivery of public services, especially when further cases are decided by the House of Lords.

94. There are two broad approaches to resolving the problem. The first three options above attempt to bring precision and exhaustiveness to defining the application of the Human Rights Act in any foreseeable circumstances. The alternative is to hold to the present

architecture of the Act, and to seek to ensure that it is applied creatively but consistently with the underlying principles which inform the whole idea of the Act, and which we believe were wholeheartedly endorsed by Parliament.

95. Our conclusion in sections 8 and 9 of this report is that section 6 of the Act is capable of such development, and that the case law is not inconsistent with this aim. However, we wish to urge this process along. We suggest principles which, in our view, could best govern the application by the courts of the meaning of “public authority”. We urge the government to use its right of intervention in the courts in the public interest to endeavour to hasten this process of development.

5 Potential solutions: legislation

96. The most radical approach to closing the gap in protection would be amendment of the Human Rights Act to rewrite the section 6 definition of public authority. It would also be possible to supplement the existing definition by scheduling or otherwise listing bodies or functions to which it applied. We now examine these alternatives.

Redefining public functions

97. Amending legislation could be introduced to re-word the general test of public authority status under section 6. Amongst others who support such an approach, the Law Society suggests that the Human Rights Act should be amended to expand the definition of public authority and that—

... any new definition should make clear that when a public body delegates functions that would otherwise be the responsibility of that public body to a private entity, those functions and the private body delivering them, are considered public for the purposes of the HRA.⁹⁶

98. However, formulating a comprehensive test of public authority status, of general and wide application, would be a very difficult task, and such a test would remain subject to judicial interpretation. The original formulation was very carefully considered, and thoroughly debated. It is possible, indeed in our view likely, that any expanded definition would bring a new set of unintended consequences when the courts came to apply it, and that a new set of anomalies would begin to emerge. **We are not convinced that any amendment to the wording of section 6(3)(b) could be devised which would be certain of achieving a more satisfactory application of Convention rights and duties than the current wording.**

Scheduling “public authorities”

99. A second possibility would be to amend the Human Rights Act to schedule a list of public authorities to the Act. Such an approach was adopted for the Freedom of Information Act 2000 (supplemented by a power of Ministerial designation by subordinate legislation, and by the definition of all publicly owned companies as public authorities). The Race Relations (Amendment) Act 2000 also schedules a list of public authorities subject to the general duty to promote race equality: similar provision is also made in the Northern Ireland Act 1998 in relation to the duty of public authorities to promote equality.

100. It is also argued that if a schedule listing individual bodies were considered to be too limiting, classes of organisations could be scheduled. Schedule 1 to the Race Relations (Amendment) Act 2000 includes a number of general categories of organisations subject to the general statutory duty to promote race equality. In relation to education, for example, it includes the following—

46. Governing bodies of—

- (a) educational establishments maintained by local education authorities;
- (b) institutions within the further education sector (within the meaning of section 91(3) of the Further and Higher Education Act 1992); or
- (c) institutions within the higher education sector (within the meaning of section 91(5) of the Act of 1992).

47. The managers of a grant-aided school (within the meaning of section 135 of the Education (Scotland) Act 1980).

48. The managers of a central institution (within the meaning of section 135 of the Act of 1980).

49. The board of management of a self-governing school (within the meaning of the Self-Governing Schools etc. (Scotland) Act 1989).

50. The board of management of a college of further education (within the meaning of section 36(1) of the Further and Higher Education (Scotland) Act 1992).

51. The governing body of an institution within the higher education sector (within the meaning of Part II of the Further and Higher Education (Scotland) Act 1992).

101. Our main objection to this approach is that it runs contrary to the whole scheme of the Act, a scheme whose generosity and flexibility we have emphasised again and again in this report. The application of section 6(3)(b) is about whether a function is or is not public. It is not about whether the body performing that function is itself in some way “public” in character. In many cases it will not be. The Human Rights Act identifies both pure and functional types of public authority. Scheduling organisations as “functional” public authorities under section 6(3)(b) of the Human Rights Act would leave open the question of which of the body’s functions were to be considered public, and would therefore bring little advance in certainty in the application of Convention rights.

102. This problem of identifying functions rather than bodies for a statutory purpose is not an issue in relation to the design of the Freedom of Information Act, the Race Relations Act (as amended) or the Northern Ireland Act. The scheme of those Acts does not appear to us to be transferable to solving the problem of the meaning of public authority under the Human Rights Act.

103. An additional though subordinate disadvantage of this approach is that although its purpose would be intended to introduce greater certainty in identifying which bodies came within the terms of section 6(3)(b) of the Human Rights Act, a schedule of public authorities would, on its own, risk inflexibility and omission. The likelihood would be that bodies not specified would be presumed by the courts to fall outside of section 6.⁹⁷ This might possibly be remedied by employing a schedule alongside the current general provision on public authority, or alongside a power of ministerial designation (see below),

97 A concern expressed to the JCHR by Lord Falconer, see Joint Committee on Human Rights, Eleventh Report of Session 2002–03, *Criminal Justice Bill: Further Report*, HL Paper 118, HC 724, Ev 20.

but we have been presented with no plausible means of combining the two approaches in this way. It would be likely to result in a conceptual muddle.

104. We do not favour the idea of scheduling a list of “functional” public authorities to the Human Rights Act.

Designating “public authorities”

105. A related idea is that amending legislation could provide for organisations to be designated as public authorities in secondary legislation. A model for this approach is section 5(1) of the Freedom of Information Act, which provides for the Secretary of State to designate a body as a public authority for the purposes of that Act by order where it—

- a) appears to the Secretary of State to exercise functions of a public nature, or
- b) is providing under a contract made with a public authority any service whose provision is a function of that authority

106. This approach seems more promising, though it is open to the same objections on grounds of exclusivity as those we have outlined above in relation to a schedule of functional public authorities. However, even if reservations about the transferability of the scheme of the Freedom of Information Act to the Human Rights Act were set aside, it seems to us highly questionable whether, in the special area of the protection and vindication of rights, replacing judicial decision with executive decision would be appropriate. **For these reasons we do not favour amending the Human Rights Act to allow designation by Ministers in subordinate legislation of particular bodies as public authorities for the purposes of the Act.**

Designating “public functions”

107. A further option would be to provide either for the ministerial designation of particular functions as public for the purposes of section 6 of the Act, or to legislate separately to designate certain functions as those that are, or may be, public. For example, Shelter proposed that there should be legislation to state that registered social landlords or housing associations are independent bodies, but that certain of their functions are public functions. These functions, Shelter proposed, would include the management of housing developed with public subsidy or previously owned by a local authority, and the provision of services that discharge functions of a local authority or social services authority.

108. BIHR suggested in its evidence that, for example, functions pursuant to an arrangement under section 21 and 26 of the National Assistance Act 1948, could be designated as public functions. Legislation (or amending legislation) in other areas such as health or social care could likewise make clear that particular functions that the legislation allows to be contracted-out are to be considered as public functions for the purposes of the Human Rights Act.

109. This option for legislation would be workable in theory, although it would yet again carry the risk of the implication of exclusivity—the risk that those functions not so specified would not be considered by the courts to be public, even if section 6(3)(b) of the Human Rights Act remained unchanged. Although we consider that the designation of public functions in legislation is a plausible approach to closing the gap in protection that has been opened by the decisions of the courts so far, we are not convinced of its desirability in practice.

6 Potential solutions: contract

Using contracts to secure protection of Convention rights

110. As we noted above, it was suggested by the Court of Appeal in *Leonard Cheshire* that, where a service was provided by a private rather than a public organisation, Convention rights could be protected by the inclusion of contractual terms for the protection of those rights.

111. We received a considerable quantity of evidence responding to the suggestion of the Court of Appeal, and a number of responses supported the use of contractual terms to close the gap in protection.⁹⁸

112. The Charity Commission suggested that the current uncertainty as to the meaning of public authority was already leading to charities inserting contractual terms which state that, in all respects with regard to the contract, the charity is to act as if it were a functional public authority under the Human Rights Act. However, in relation to contracts between public bodies and private service providers, the recent report of the Audit Commission found that 61% of local government, health and criminal justice bodies had not taken any action to ensure that their contractors complied with the Human Rights Act.⁹⁹ Although the Audit Commission found that across local government there were “some examples of tendering and contracting processes being revised to comply with human rights legislation”, it expressed concern that “this continues to be a major area of weakness for public bodies”.¹⁰⁰ But the evidence we have received suggests that even if human rights terms were routinely inserted in public service contracts, there are potential pitfalls in the contractual route. Below, we consider how contractual protection of Convention human rights might work.

113. In the delivery of public services, it is common for any contractual arrangement to be solely between the public body and the private service provider. Some submissions noted that, for example, where a local authority purchases care services from an independent provider, the residents affected would not generally be a party to these arrangements unless they had been specially joined to a tripartite contract. In some cases there may be two concurrent contracts, one with the resident and one with the local authority.¹⁰¹

114. There are therefore two ways in which contracts might be used to ensure protection of the human rights of those receiving privately-delivered public services. The first is through the terms of a contract between a “pure” public authority and a private person or body for the delivery of services for which the public authority has a statutory responsibility. The second is through the terms of a contract between the private person or body delivering a “public” service and the user of the service. Each of these approaches raises particular issues which we now consider.

98 Charity Commission, Ev 17; the Housing Corporation, Ev 6; and the National Housing Federation, Ev 10.

99 Audit Commission, *Human Rights: Improving Public Service Delivery*, September 2003, para. 24, Exhibit 4.

100 *Ibid.*, para 24.

101 Ev 18.

Contracts between a public body and a private organisation

115. Protection of Convention rights through contracts between the public body and the private service provider raise difficulties both of enforceability and of consistency. Although they would be enforceable at the suit of the public authority, they might not always be enforceable at the suit of users, who will not themselves be parties to the contracts.¹⁰² We asked the Secretary of State for Constitutional Affairs whether he believed contractual terms could provide effective protection for human rights. In a supplementary written answer he concluded—

Contractual terms will not, of course, provide the level of protection offered by sections 6 and 7 of the Human Rights Act 1998, but we believe that a contracting authority could design terms to impose obligations on the contractor which achieves a similar effect.¹⁰³

We agree that contract may provide some measure of protection. But contractual terms which are not enforceable by those whose rights they seek to protect are clearly not a substitute for direct protection of Convention rights under sections 6 and 7 of the Human Rights Act.

116. Protection of Convention rights through contracts between public bodies and private service providers also raises difficulties of consistency, in two respects.

117. First, contracts entered into before the coming into force of the Human Rights Act, or indeed before the possibility of human rights contractual terms had been raised by the Court of Appeal, would leave Convention rights unprotected without revision of the contracts. As the Secretary of State for Constitutional Affairs commented—

Unilateral imposition of contractual terms post hoc is problematic and it would be inappropriate for public authorities to re-negotiate all the contracts to which they are committed.¹⁰⁴

There is therefore likely to be persistent inequality between users of the same service, depending on when they entered into their contracts.¹⁰⁵

118. Second, there is the possibility that contractual terms would vary, for example between different local authority areas.¹⁰⁶ This could be mitigated by standard contractual terms devised centrally, but contracts will nevertheless be subject to individual negotiation. As the Secretary of State for Constitutional Affairs again remarked—

¹⁰² This problem may be alleviated by the Contracts (Rights of Third Parties) Act 1999 which relaxes the common law rule that third parties cannot enforce the terms of a contract. However, enforcement by third parties under the Act is both conditional and not straightforward: the Act is only applicable if the contract expressly provides for third party enforcement (section 1(1)(a)) and where it purports to confer a benefit on the third party (section 1(1)(b)). The Act would not apply if on a proper construction of the contract it appeared that the parties did not intend the term to be enforceable by the third party (section 1(2)). It was pointed out in evidence that there could well be complicated and costly private law proceedings simply to establish, as a preliminary issue, that the third party could enforce any contract rights. Furthermore, the Act applies only to contracts concluded after 11 May 2000; contracts entered into before this date would not be enforceable by third parties. Written Evidence of DIAL UK, Ev 18.

¹⁰³ Ev 3.

¹⁰⁴ Ev 3.

¹⁰⁵ DIAL UK, Ev 18 and Kate Marcus, *op cit*.

¹⁰⁶ Ev 29.

I do not think that it would be possible to require public authorities to insert contractual terms.¹⁰⁷

There cannot be any assurance that contractual terms will lead to Convention rights being applied as consistently as they would be where there is a statutory duty under the Human Rights Act. Contractors might not always be content to accept human rights obligations, and a local authority faced with financial constraints, or with a limited number of potential contractors in its area, might well have no option but to negotiate on the extent of the protection proposed in the contract, or may choose not to pursue this approach. **Although it may be possible for a public body to include human rights protections in its contracts with service providers, there is no legal obligation on it to do so. There is nothing in the case law of the European Court of Human Rights, or in the UK case law under the Human Rights Act, which would impose a positive obligation on a public body routinely to protect Convention rights through contract.**

119. One possible advantage of protection being embodied in contracts between a public body and a private sector service provider would be that such terms could provide evidence that the parties to the contract intended that the private contractor should have human rights responsibilities equivalent to those of a public authority. It might be that the terms of a contract would influence a court in its decision as to whether a body was a functional public authority, in a borderline case. Such terms could also be taken to create a legitimate expectation on the part of the service user that human rights would be complied with in the provision of the service. Conversely, such a development would again raise the danger that the absence of contractual terms would be taken to imply the absence of an intention to accept the need for protection of Convention rights.

120. We have stressed in previous reports that human rights protection is not only concerned with access to court and the enforcement of human rights standards through litigation: it is also achieved through good practice, and the development of an organisational culture of respect for human rights. Furthermore, users of public service would not be parties to the contract, and would have no role in its negotiation. **Although terms relating to human rights in contracts between a service provider and the contracting-out public body could form the basis for developing a culture of human rights within the private sector service provider, litigation or the threat of litigation is not the best way in which such a culture might be fostered. That will be better promoted by awareness of the obligations arising from direct responsibilities under section 6 of the Act.**

Contracts between the service provider and the service user

121. Were clauses for the protection of Convention rights to be included in contracts between the private sector service provider and the individual service user (in circumstances where this was practicable), it would avoid the risk of service users lacking legally enforceable rights under the contract. However, the risks of inconsistency we have identified above would remain, and indeed would be exacerbated.

107 Ev 3.

122. If uniform contracts cannot be imposed centrally, then there must also be concern about potential inequality of bargaining power in the negotiation of contracts between private service providers and individual users. People are likely to enter into contracts with public service providers at particularly vulnerable moments in their lives. Care home residents, for example, are likely to be in a weak negotiating position on their admission,¹⁰⁸ and there is also likely to be unequal bargaining power between registered social landlords and their tenants.¹⁰⁹ Many individuals will not have access to legal advice; and many will be unlikely to be aware of the significance of human rights terms in the contract.¹¹⁰

123. This imbalance applies equally to enforcement. Many users of public services are not (to say the least) well informed about the terms of their contracts with service providers.¹¹¹ Research by the Office of Fair Trading¹¹² found that only about one third of the elderly care home residents surveyed were aware of being a signatory to a contract,¹¹³ and over two-thirds either did not know or could not remember what sort of areas were covered by their agreement with the home.¹¹⁴

124. These difficulties call into question the potential effectiveness of contractual clauses to provide protection equal to that offered by direct protection of rights under the Human Rights Act. Other anomalies were also cited in evidence to us. Liberty and Oxford Public Interest Lawyers argue that applicants may be disadvantaged by not having their claims heard in the Administrative Court—

Contract actions and judicial review actions are heard by different courts. Whilst the courts share the same obligations as public authorities under the Human Rights Act, the balance of judicial experience and expertise in human rights lies with the high court judges sitting in the Administrative Court. The same is true of the lawyers who practice there.¹¹⁵

Although any such difficulties might be overcome, there is no doubt that different time limits,¹¹⁶ as well as different defences, would apply to those enforcing their Convention rights by way of contract,¹¹⁷ and different standards would creep in. It is not obvious that this would lead to an improvement on the current state of affairs.

108 Ev 18.

109 Ev 29.

110 Kate Marcus, *op cit*.

111 *ibid.*, Age Concern, Ev 14; JUSTICE, Ev 40; DIAL UK, Ev 18.

112 Office of Fair Trading Report into Older People as Consumers in Care Homes (October 1998).

113 *Ibid.* p. 48. 18% of respondents said that they had signed a contract; 18% said that a relative or friend had signed a contract; the remainder either had not signed a contract or were unaware of whether a contract existed.

114 *Ibid.* p. 49.

115 Ev 55, para. 21.

116 Under section 7(5)(a) of the HRA, proceedings against a public authority under the Act must be brought one year following the act complained of. This is subject to any other more restrictive time limit applicable in the proceedings and may also be extended by the court where it is equitable to do so. The limitation period for proceedings in breach of contract is 6 years, under the Limitation Act 1980.

117 Ev 55.

Conclusion

125. It appears to us that access to redress for human rights violations will be considerably more complex and, it is likely, less effective under the private law contractual model than as a product of the more direct public law provision of the Human Rights Act. It is likely to create inequalities between local authority areas. Even within a single local authority area, where services are in part provided directly by the local authority and in part under contract by the private sector, there are also likely to be inconsistencies, in the absence of rigorously enforced standard contractual terms, in the contractual terms negotiated. **We are unconvinced that the inclusion of contractual terms for human rights protection could provide fully comprehensive, consistent and equal human rights protection for the recipients of public services on an equal basis with statutory responsibility under section 6 Human Rights Act.**

126. We consider the question of guidance in the development of standard contractual terms in the next section.

7 Potential solutions: guidance

Standard contractual terms

127. We asked in our call for evidence whether any standard contractual terms for human rights protection had been prepared. Although none were disclosed by the evidence, it is anticipated that the Improvement and Development Agency (IDeA) will develop standard contractual terms for procurement to include terms on human rights protection.¹¹⁸ One very welcome recent development has been the Audit Commission report *Human Rights: Improving Public Service Delivery* (September 2003) which includes a checklist for public authorities contracting out services, designed to ensure that human rights considerations have been taken fully into account in the contractual arrangement.

128. Although contractual terms may not be capable of providing a fully comprehensive solution, we do see some potential, as we described in the preceding section, in the development of standard contractual terms that would be required to be applied consistently wherever public services were contracted out, even if only as a stop-gap measure. We asked Lord Falconer whether the DCA had given any consideration to the development of standard contractual terms. In supplementary written evidence we were told—

The Deputy Prime Minister's letter of the 30 April to you, made it clear that we consider it good practice when drawing up contracts to take account of any Human Rights Act implications that may apply. My department is in discussion with his about how best to take this forward.¹¹⁹

129. We recommend that the relevant government departments, in particular the Department for Constitutional Affairs and the Office of the Deputy Prime Minister, should give urgent attention to the development of guidance on the protection of human rights through contract, taking account of the potential problems we have identified in section 6 of this report.

130. In requesting written evidence from representative groups for private sector service providers, we asked them as well whether they had produced any guidance on the meaning of public authority under the Human Rights Act. Although none had then been issued, the Audit Commission's recent report, *Human Rights: Improving Public Service Delivery* (September 2003) includes guidance on the responsibilities of contracting-out public authorities. It advises that—

When a public body contracts out services to a private or voluntary sector provider, it cannot assume that the service provider will be liable for any breach of the human rights of service users ... The complexity and difficulty experienced by public bodies in ensuring that contractors comply with the Act cannot be underestimated. This is also compounded by emerging case law as to what can be defined as a public body under the Act. Following the decision of the Court of Appeal in *R (Heather) v Leonard Cheshire*, most private organisations that contract with public bodies to provide

¹¹⁸ As part of the Strategic Programme on Procurement developed in conjunction with ODPM and the LGA.

¹¹⁹ Ev 3.

services do not constitute public bodies for the purposes of the Human Rights Act, despite the public nature of the work in which they engage. Unless the public body exerts a significant degree of operational control over the service provider, it is likely that the courts will consider the service provider to be outside the scope of the Human Rights Act. The courts have made it clear that individuals may bring an action against the public body that entered into the contract rather than the supplier for failing to protect adequately their human rights.¹²⁰

The Commission goes on to suggest that—

In order to minimise breaches of human rights by service providers, public bodies should, when negotiating contracts, require the service provider to undertake to protect the human rights of service users. This will bind service providers to the Act. If an individual's human rights are breached by a service provider who has entered into a contract that guarantees service users' rights, an individual may bring a claim directly against the service provider using the Act. If a public body enters into contracts in this way it will have endeavoured to protect the rights of service users.¹²¹

131. We welcome this guidance as providing constructive advice in light of the current law. We retain some doubt, however as to the liability of contracting-out public bodies, as we explained above in section 6 of this report.

132. The Charity Commission also told us that it is in the process of reviewing its operational guidance on the implications of the Human Rights Act for charities, including the meaning of a public authority.

Guidance from the Government on the meaning of “public authority”

133. Some submissions to the inquiry suggested that there should be an authoritative government statement on the meaning of public authority, or the public authority status of particular classes of bodies. This could take the form of ministerial guidance or a clear statement from the Secretary of State.¹²² As a first step, the government could itself adopt a clear commitment to a broad definition of “public function” as a means of promoting a human rights culture.¹²³ However, there are few signs that it is willing to do so. We asked the Department what it had done, or what plans it had, in relation to issuing such guidance. We were told that it had—

... no current plans to issue specific guidance on the emerging case law on the meaning of public authority. However we are revising our popular study guide to the Act (prepared in partnership with the Bar Council) and will update regarding the position in that, which is for publication before Easter.¹²⁴

134. It would not help the case we are advancing, of course, if the Government were to issue guidance on “the emerging case law” on the meaning of public authority in a way which appeared to endorse it—as this report makes clear, we do not think the emerging

120 Audit Commission, *Human Rights: Improving Public Services Delivery*, September 2003, pp. 11–12.

121 Ibid., p. 12.

122 Ev 31.

123 Ev 40.

124 Ev 3.

case law is satisfactory. Official guidance from the Government would be helpful in indicating to public authorities means of ensuring that the protection of the Human Rights Act could be preserved. Were it to attempt to be prescriptive about public functions, it is not obvious that it would be persuasive in matters of dispute, and it might also be open to the objections we raised above both against the risks of appearing to be exclusive and against the desirability of substituting executive fiat for judicial interpretation. **On the whole, we do not consider that government guidance on the generality of the meaning of “public authority” under the Human Rights Act has the potential to reduce greatly the gap in protection we have identified.**

8 A solution: principles of interpretation

135. We now put forward our view on certain general principles for the interpretation of section 6(3)(b) of the Human Rights Act which we believe are fundamental to the effective operation of the “public authority” responsibilities under the Act, and therefore to the effectiveness of the Act as a whole in protecting Convention rights. We would particularly stress that these principles are appropriate to the intention of Parliament in enacting the Human Rights Act, an intention evidenced by the Parliamentary debates referred to in the first section of this report.¹²⁵ We believe that these principles would allow an application of section 6 that more fully satisfies the UK’s international obligations under Articles 1 and 13 of the Human Rights Act and give true effect to the intention of Parliament to “bring rights home”, by addressing the practical gaps in human rights protection which we have identified in this report.

Functional and institutional tests

136. It is important that the test that should be applied under section 6(3)(b) is functional rather than institutional. It is clear, under the terms of section 6, that “functional” public authorities fall to be identified by very different criteria from pure public authorities. Whilst the latter attain their public authority status because of the type of organisation they are—by the place of the organisation within or very close to the machinery of government—the status of the latter is to be assessed without reference to the nature of the organisation itself. Section 6(3)(b) makes clear that functional public authority status may attach to “any person certain of whose functions are functions of a public nature.” Under section 6(5), such a body is not for all purposes a public authority and will not be so “if the nature of the act is private”.

137. The difficulties in defining two key terms—“public” and “function”—have led to confusion in the application of section 6 through reliance on criteria, including statutory basis and institutional proximity to the State, which are not warranted either by the language of the Act or by the ECHR.

Public functions and government programmes

138. In our view, a function is a public one when government has taken responsibility for it. Very few services or acts are in themselves inherently public. There is no doubt that caring for the sick, or educating children, do not involve acts that are inherently public. Health and education services can be and are provided by the State; they can equally well be provided by commercial enterprises, or charitable organisations, or families. To limit the meaning of public functions to those functions which can only (legally) be carried out by the State would be to confine its meaning to a narrow category hardly extending beyond coercive powers. This would leave the Human Rights Act far short of fulfilling the UK’s obligation to protect and secure Convention rights effectively, forcing the victims of violations to rely on the Strasbourg court for redress.

¹²⁵ Although we think it neither necessary or appropriate to rely on statements made in those debates for the purpose of interpreting section 6.

139. The range of functions which are generally considered to be public, in that they are generally expected to be performed directly or indirectly by the State, varies over time. The State has in the past used direct delivery by government-owned or controlled bodies to effect the enlargement of the scope of its activities, but in the last 25 years or so has moved significantly in the direction of indirect delivery of many of these same functions, and some new ones.

140. The key test of whether a function is public is whether it is one for which the government has taken responsibility in the public interest. For example, although the various activities involved in care for the sick may be performed by anyone, the State has chosen, through a comprehensive social programme, to provide healthcare to those who wish to receive healthcare from the State rather than privately. This programme is undertaken in the public interest to provide what the government considers to be an important social service. In our view, discharge of duties necessary for provision of the government programme of healthcare is a public function. Discharge of healthcare services, in itself, is not. It is the doing of this work as part of a government programme which denotes a public function, rather than the provision of healthcare in itself. In performing duties as part of the State programme of healthcare, a private organisation is assisting in performing what the State itself has identified as the State's responsibilities.

141. Similarly, provision of services for the elderly could equally well be a private function, if provided to private patients in a private home, or by relatives of the elderly person. The provision of the care is a public function where it is undertaken as part of a government programme of State provision of such care. The function being assumed by the private organisation is the function of providing care which the State has taken on the responsibility to provide. This makes the function public.

Public functions and statute

142. **On the principles set out above, for a body to discharge a public function, it does not need to do so under direct statutory authority. A State programme or policy, with a basis in statute or otherwise, may delegate its powers or duties through contractual arrangements without changing the public nature of those powers or duties. Under section 6 of the Human Rights Act, there should be no distinction between a body providing housing because it itself is required to do so by statute, and a body providing housing because it has contracted with a local authority which is required by statute to provide the service. The loss of a single step in proximity to the statutory duty does not change the nature of the function, nor the nature of its capacity to interfere with Convention rights.**

Public functions and public institutions

143. **Institutional links with a public body are not necessary to identifying a public function** (although by contrast they are relevant to assessing whether a body as a whole is a “pure public authority” under section 6, and to whether a body is amenable to judicial review). Although institutional proximity to the State may supply evidence that the organisation is delivering on a public or governmental programme, and is therefore performing a public function, it does not, in itself, determine the nature of the function being performed. An organisation could be closely administratively connected with a State authority, whilst performing only private functions, for example the recruitment of staff. Furthermore, the criterion of enmeshment or connection with a State authority has no basis in the jurisprudence of the European Court of Human Rights.¹²⁶ In human rights terms, it is a purely arbitrary criterion, and leaves open the possibility that protection under the Human Rights Act could fail to meet the State’s obligations under Articles 1 and 13 ECHR.

Public functions and public power

144. It is uncontroversial that the coercive powers of the State, even when exercised by private bodies, remain public in nature. Into this category, for example, fall the exercise of powers of detention enjoyed by privately run prisons, and under authority of the Mental Health Acts.¹²⁷ But to confine “public function” to such activities would, it appears to us, risk improperly identifying a public function with the exercise of public powers

145. Governmental control may also engage the State’s responsibility where it is monopolistic, in its regulation of private activity or its provision of a service. This type of function is public at least in part because individuals are exclusively dependent on the body exercising it, and exclusively dependent on it to realise their Convention rights.¹²⁸

146. Exclusive control by a service provider, and exclusive dependence on it by an individual, can also exist where there is exclusive control of an individual situation, though perhaps not monopoly of an entire sector. If, as in the *Leonard Cheshire* case, the issue is whether Article 8 rights can be realised by the continued operation of a particular care home, the decision to allow that, and the consequent protection of Article 8 rights, is exclusively within the gift of the administrators of the care home. The administrators of the care home may not exclusively provide care services within the area concerned, but they exclusively provide the particular service necessary (in the claimant’s arguments) to uphold their Convention rights.

¹²⁶ Para 41 above.

¹²⁷ *R (A) v Partnerships in Care Ltd* [2002] EWHC 529 Admin

¹²⁸ See for example the *Hampshire Farmers’ Market* case, in particular the judgment of the Divisional Court, [2002] EWHC 2539 Admin; [2003] EWCA Civ 1056.

147. The attribution of public authority responsibilities to private sector bodies is justified on the basis that the private body operating to discharge a government programme is likely to exercise a degree of power and control (which in the absence of delegation would be State power and control) over the realisation of the individual's Convention rights.

9 Conclusion

148. We have concluded that the application of the functional public authority provision in section 6(3)(b) of the Human Rights Act leaves real gaps and inadequacies in human rights protection in the UK, including gaps that affect people who are particularly vulnerable to ill-treatment. We consider that this deficit in protection may well leave the UK in breach of its international obligations to protect the Convention rights of all those in the jurisdiction and to provide mechanisms for redress where those rights are breached.

149. We have taken the view, however, that it would be undesirable to amend section 6, for a number of reasons. As well as being too early in the experience of the Act's implementation, it would be likely to sacrifice the flexibility of the Act and to inhibit its capacity to adapt to changing social circumstances and thereby ensure comprehensive and consistent human rights protection. It would be difficult to devise a magic formula to provide a comprehensive and precise definition of public authority, and any attempt to do so would, in our view, be likely to create as many problems as it solves.

150. We have considered whether the gap in protection could be closed by specifying the bodies whose activities fall within the ambit of the Act. We conclude that this is both impractical and undesirable. It would risk restricting the category of bodies in ways that would exclude those which should be held responsible under the Act. It would also be based on a misconception of the Act's scheme – it is not particular bodies which fall within the ambit of section 6(3)(b), it is particular functions.

151. An attempt to define public functions in statute would be a more promising route to resolving the problem, but it would still be open to many of the objections which we identify to attempting to list public bodies. Nor have we been able to discover any convincing formulation of how to do so.

152. We have considered other possible solutions. We do not consider that the “horizontal” application of the Act's provisions, through the duty on the courts to act compatibly with Convention rights and to interpret the law so far as possible in compliance with those principles, will sufficiently address the problem of determining whether individuals can seek redress against the State. Nor do we consider that the possibility that public authorities remain responsible for the actions of those to whom they delegate the discharge of their functions will provide sufficient redress.

153. We have considered whether the gap could be closed through the inclusion of terms guaranteeing human rights protection in contracts between private or voluntary bodies delivering public services and the contracting authority or individual user. While this may provide some measure of protection, we conclude that the result is likely to be partial, inconsistent and unequal protection of rights.

154. We have considered whether the gap could be closed by the imposition or encouragement of best practice, particularly in the formulation of contracts, effected through guidance from the government or other responsible bodies. We have concluded that although such guidance would be helpful, and indeed is urgently required in the current confused situation, it cannot provide a complete or enduring solution.

155. The problem with the meaning of public authority appears to us not to be intrinsic to the wording of section 6; nor is it a necessary consequence of the shifting roles of the public and private sectors. It arises principally from an institutional rather than a functional focus in the application of the provision by most of the courts which have had to decide whether a body is a functional public authority. **In our view, it would be unsatisfactory to leave this matter to the present state of the case law. In his oral evidence, the Secretary of State told us that he would keep the matter of the interpretation of the meaning of “public authority” by the courts “under close review” and would “pay particular attention to the need to intervene in future cases on the meaning of section 6(3)(b)”.**¹²⁹ We urge the Government to intervene in the public interest as a third party in cases where it can press the case for a broad, functional interpretation of the meaning of public authority under the Human Rights Act. In the interests of the full protection of Convention human rights which the Human Rights Act was designed to achieve, what is needed is a careful application of the current section 6 test so as to prevent any diminution in human rights protection arising from the contracting out of public services. This would ensure compliance with the UK’s international obligations to protect Convention rights. We consider that this can be achieved, on the application of principles of ECHR law and the terms of section 6.

156. We have set out the principles of interpretation which we believe would, if adopted by the courts, do much to close the gap in the protection offered under the Human Rights Act which has opened up as a consequence of some early decisions on the application of the “public function” test. Such principles would, in our view, be consistent with the approach of the House of Lords to the interpretation of section 6 in the *Aston Cantlow* case, which provides the only decision so far of the highest court on the meaning of section 6(3)(b). The House of Lords in that case took the view that, in order to best achieve the statutory purpose of the Human Rights Act, a narrow category of “pure” public authorities should be complemented by a wide category of “functional” public authorities identified on the basis of public function. Interpretation of section 6 in accordance with the principles we suggest would also ensure that the Human Rights Act fully satisfies the UK’s international obligations under Articles 1 and 13 ECHR, as was the intention of the legislature.

157. We conclude that, as a matter of broad principle, a body is a functional public authority performing a public function under section 6(3)(b) of the Human Rights Act where it exercises a function that has its origin in governmental responsibilities, as explained in paragraph 134 above, in such a way as to compel individuals to rely on that body for realisation of their Convention human rights.

¹²⁹ Minutes of Evidence taken before the Joint Committee on Human Rights, 8 December 2003, HL Paper 45, HC 106-I, Q 99.

Conclusions and recommendations

A gap in human rights protection

1. The tests being applied by the courts to determine whether a function is a “public function” within the meaning of section 6(3)(b) of the Human Rights Act are, in human rights terms, highly problematic. Their application results in many instances where an organisation “stands in the shoes of the State” and yet does not have responsibilities under the Human Rights Act. It means that the protection of human rights is dependent not on the type of power being exercised, nor on its capacity to interfere with human rights, but on the relatively arbitrary (in human rights terms) criterion of the body’s administrative links with institutions of the State. The European Convention on Human Rights provides no basis for such a limitation, which calls into question the capacity of the Human Rights Act to bring rights home to the full extent envisaged by those who designed, debated and agreed the Act. (Paragraph 41)
2. In our view, the principles set out by Lord Hope of Craighead in *Aston Cantlow* would provide an effective basis for protection of the Convention rights. Although the House of Lords in that case did not expressly overrule the decisions in *Poplar* and in *Leonard Cheshire*, it appears that the principles set out by Lord Hope in *Aston Cantlow* are at odds with those earlier decisions of the lower courts. In our view, the approach in *Aston Cantlow* is to be preferred. (Paragraph 42)
3. A serious gap has opened in the protection which the Human Rights Act was intended to offer, and a more vigorous approach to re-establishing the proper ambit of the Act needs to be pursued. This is not just a theoretical legal problem. The development of the case law has significant and immediate practical implications. (Paragraphs 43 and 44)

Why does the meaning of “public authority” matter?

4. Those providing important public services, whether from the State or private sectors, should not be left uncertain about their responsibilities to protect fundamental human rights. (Paragraph 49)
5. Given the range of private and voluntary sector involvement in public service provision, the extent of public authority responsibilities under the Human Rights Act is profoundly significant to both the providers and the recipients of these services. (Paragraph 58)
6. As the case law currently stands, whether human rights breaches by private and voluntary sector providers of public services will give rise to accountability under the Human Rights Act is likely to depend on a number of relatively arbitrary criteria. (Paragraph 69)

7. The gaps and inconsistencies in human rights protection arising from this situation are likely to mean that the UK falls short of its international obligations (under Articles 1 and 13 ECHR) to secure the effective protection of Convention rights and to provide an effective remedy for their breach. (Paragraph 73)
8. The disparities in human rights protection that arise from the current case law on the meaning of public authority are unjust and without basis in human rights principles. Unless other avenues of redress can be found, this situation is likely to deprive individuals of redress for breaches of their substantive Convention rights incorporated under the Human Rights Act. The situation created by the current state of the law is unsatisfactory, unfair, and inconsistent with the intention of Parliament. (Paragraph 74)

Concerns of service providers and users

9. Identification as a functional public authority, that is, a private sector body that is performing a public function for the purposes of section 6 of the Human Rights Act, would not jeopardise the independence from the state of a non-governmental body. (Paragraph 62)
10. The financial burden, responsibility and possible conflict with other duties, for example, under charity law, that public authority status may impose on a voluntary sector organisation needs to be taken into account by State bodies when they contract-out public functions. (Paragraph 63)
11. It is irrelevant to deciding the application of the Act whether an organisation performing a public function is deemed to be within or without the public sector for wider, including financial, purposes. (Paragraph 65)

Is the category of “functional public authority” necessary?

12. Accountability of the contracting-out body for compliance with Convention rights by contractors (where and to the extent that it is available) is not an adequate substitute for direct accountability of the service provider under section 6. If a human rights culture is to be developed in our public administration and public services, this will not be promoted by removing from those delivering sensitive services the responsibility for compliance with, and the liability for breaches of, those human rights standards. (Paragraph 85)
13. The lack of a cause of action to bring a case to court would mean that in many cases “horizontal” application of Convention rights would be of little assistance to victims of a breach of Convention rights by a provider of a public service which was not a public authority. Section 6 of the Human Rights Act is the only legal mechanism available which ensures full responsibility for the protection of, and direct accountability for breaches of, Convention rights. (Paragraph 88)

Potential solutions: amending or supplementing the Act

14. We are not convinced that any amendment to the wording of section 6(3)(b) could be devised which would be certain of achieving a more satisfactory application of Convention rights and duties than the current wording. (Paragraph 98)
15. Our main objection to the idea of scheduling a list of public authorities to the Act is that it runs contrary to the whole scheme of the Act, a scheme whose generosity and flexibility we have emphasised again and again in this report. The application of section 6(3)(b) is about whether a function is or is not public. It is not about whether the body performing that function is itself in some way “public” in character. In many cases it will not be. The Human Rights Act identifies both pure and functional types of public authority. Scheduling organisations as “functional” public authorities under section 6(3)(b) of the Human Rights Act would leave open the question of which of the body’s functions were to be considered public, and would therefore bring little advance in certainty in the application of Convention rights. We do not favour the idea of scheduling a list of “functional” public authorities to the Human Rights Act. (Paragraphs 101 and 104)
16. We do not favour amending the Human Rights Act to allow designation by Ministers in subordinate legislation of particular bodies as public authorities for the purposes of the Act. (Paragraph 106)
17. Although we consider that the designation of public functions in legislation is a plausible approach to closing the gap in protection that has been opened by the decisions of the courts so far, we are not convinced of its desirability in practice. (Paragraph 109)

Potential solutions: contract

18. Contract may provide some measure of protection for the rights of service users. But contractual terms which are not enforceable by those whose rights they seek to protect are clearly not a substitute for direct protection of Convention rights under sections 6 and 7 of the Human Rights Act. (Paragraph 115)
19. Although it may be possible for a public body to include human rights protections in its contracts with service providers, there is no legal obligation on it to do so. There is nothing in the case law of the European Court of Human Rights, or in the UK case law under the Human Rights Act, which would impose a positive obligation on a public body routinely to protect Convention rights through contract. (Paragraph 118)
20. Although terms relating to human rights in contracts between a service provider and the contracting-out public body could form the basis for developing a culture of human rights within the private sector service provider, litigation or the threat of litigation is not the best way in which such a culture might be fostered. That will be better promoted by awareness of the obligations arising from direct responsibilities under section 6 of the Act. (Paragraph 120)

21. We are unconvinced that the inclusion of contractual terms for human rights protection could provide fully comprehensive, consistent and equal human rights protection for the recipients of public services on an equal basis with statutory responsibility under section 6 Human Rights Act. (Paragraph 125)

Potential solutions: guidance

22. We recommend that the relevant government departments, in particular the Department for Constitutional Affairs and the Office of the Deputy Prime Minister, should give urgent attention to the development of guidance on the protection of human rights through contract, taking account of the potential problems we have identified in section 6 of this report. (Paragraph 129)
23. We welcome the guidance given by the Audit Commission to local authorities as providing constructive advice in light of the current law. We retain some doubt, however, as to the liability of contracting-out public bodies, as we explained in section 6 of this report. (Paragraph 131)
24. We do not consider that government guidance on the generality of the meaning of “public authority” under the Human Rights Act has the potential to reduce greatly the gap in protection we have identified. (Paragraph 134)

A solution: principles of interpretation

25. The difficulties in defining two key terms—“public” and “function”—have led to confusion in the application of section 6 through reliance on criteria, including statutory basis and institutional proximity to the State, which are not warranted either by the language of the Act or by the ECHR. A function is a public one when government has taken responsibility for it. (Paragraphs 137 and 138)
26. On the principles we have set out, for a body to discharge a public function, it does not need to do so under direct statutory authority. A State programme or policy, with a basis in statute or otherwise, may delegate its powers or duties through contractual arrangements without changing the public nature of those powers or duties. Under section 6 of the Human Rights Act, there should be no distinction between a body providing housing because it itself is required to do so by statute, and a body providing housing because it has contracted with a local authority which is required by statute to provide the service. The loss of a single step in proximity to the statutory duty does not change the nature of the function, nor the nature of its capacity to interfere with Convention rights. (Paragraph 142)
27. Institutional links with a public body are not necessary to identifying a public function. (Paragraph 143)
28. The attribution of public authority responsibilities to private sector bodies is justified on the basis that the private body operating to discharge a government programme is likely to exercise a degree of power and control (which in the absence of delegation would be State power and control) over the realisation of the individual’s Convention rights. (Paragraph 147)

Conclusion

29. The application of the functional public authority provision in section 6(3)(b) of the Human Rights Act leaves real gaps and inadequacies in human rights protection in the UK, including gaps that affect people who are particularly vulnerable to ill-treatment. We consider that this deficit in protection may well leave the UK in breach of its international obligations to protect the Convention rights of all those in the jurisdiction and to provide mechanisms for redress where those rights are breached. (Paragraph 148)
30. It would be unsatisfactory to leave this matter to the present state of the case law. In his oral evidence, the Secretary of State for Constitutional Affairs told us that he would keep the matter of the interpretation of the meaning of “public authority” by the courts “under close review” and would “pay particular attention to the need to intervene in future cases on the meaning of section 6(3)(b)”. We urge the Government to intervene in the public interest as a third party in cases where it can press the case for a broad, functional interpretation of the meaning of public authority under the Human Rights Act. In the interests of the full protection of Convention human rights which the Human Rights Act was designed to achieve, what is needed is a careful application of the current section 6 test so as to prevent any diminution in human rights protection arising from the contracting out of public services. (Paragraph 155)
31. As a matter of broad principle, a body is a functional public authority performing a public function under section 6(3)(b) of the Human Rights Act where it exercises a function that has its origin in governmental responsibilities, in such a way as to compel individuals to rely on that body for realisation of their Convention human rights. (Paragraph 157)

Annex: Section 6 of the Human Rights Act 1998

Public Authorities

Acts of public authorities

6.—(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section “public authority” includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) “Parliament” does not include the House of Lords in its judicial capacity.

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) “An act” includes failure to act but does not include a failure to—

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

Formal Minutes

Monday 23 February 2004

Members Present:

Jean Corston MP, in the Chair

Lord Bowness	Mr David Chidgey MP
Lord Campbell of Alloway	Mr Kevin McNamara MP
Lord Judd	Mr Paul Stinchcombe MP
Lord Lester of Herne Hill	
Lord Plant of Highfield	
Baroness Prashar	

The Committee deliberated.

* * * * *

Draft Report [The Meaning of Public Authority under the Human Rights Act], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 157 read and agreed to.

Resolved, That the Report be the Seventh Report of the Committee to each House.

Ordered, That certain papers be appended to the Report.

Ordered, That the Chairman do make the Report to the House of Commons and that Baroness Prashar do make the Report to the House of Lords.

[Adjourned till Monday 1 March a quarter past Four o'clock.]

List of Written Evidence

Government

1. Office of the Deputy Prime Minister	Ev	1
2. Department of Health	Ev	2
3. Department for Constitutional Affairs	Ev	3

Housing

4. Chartered Institute of Housing	Ev	4
5. Housing Corporation	Ev	6
6. Local Government Association	Ev	9
7. National Housing Federation	Ev	10
8. Partnerships UK	Ev	13

Organisations

9. Age Concern England	Ev	14
10. Charity Commission	Ev	17
11. DIAL UK	Ev	18
12. Help the Aged	Ev	24
13. Shelter	Ev	29
14. British Humanist Association	Ev	32
15. British Institute of Human Rights	Ev	36
16. British Irish Rights Watch	Ev	38
17. Children's Rights Alliance for England	Ev	39
18. JUSTICE	Ev	40
19. Law Society	Ev	48
20. Liberty and the Oxford Public Interest Lawyers	Ev	51

Individuals

21. Norman Doe, Mark Hill, Frank Cranmer, Javier Oliva and Christiana Cianitto, Centre for Law and Religion of the Cardiff Law School	Ev	57
22. Dr Augur Pearce, Lecturer at the Cardiff Law School	Ev	71
23. Philip Plowden, Associate Dean and Kevin Kerrigan, Principal Lecturer, Centre for Human Rights Practice, Northumbria University	Ev	76
24. Morag McDermont, University of the West of England	Ev	81

The following submission has not been printed:

Forthcoming article by Professor Dawn Oliver, University College London, *Functions of a Public Nature under the Human Rights Act*

Reports from the Joint Committee on Human Rights since 2001

The following reports have been produced

Session 2003–04

First Report	Deaths in Custody: Interim Report	HL Paper 12/HC 134
Second Report	The Government's Response to the Committee's Ninth Report of Session 2002-03 on the Case for a Children's Commissioner for England	HL Paper 13/HC 135
Third Report	Scrutiny of Bills: Progress Report	HL Paper 23/HC 252
Fourth Report	Scrutiny of Bills: Second Progress Report	HL Paper 34/HC 303
Fifth Report	Asylum and Immigration (Treatment of Claimants, etc.) Bill	HL Paper 35/HC 304
Sixth Report	Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4	HL Paper 38/HC 381

Session 2002–03

First Report	Scrutiny of Bills: Progress Report	HL Paper 24/HC 191
Second Report	Criminal Justice Bill	HL Paper 40/HC 374
Third Report	Scrutiny of Bills: Further Progress Report	HL Paper 41/HC 375
Fourth Report	Scrutiny of Bills: Further Progress Report	HL Paper 50/HC 397
Fifth Report	Continuance in force of sections 21 to 23 of the Anti-terrorism, Crime and Security Act 2001	HL Paper 59/HC 462
Sixth Report	The Case for a Human Rights Commission: Volume I Report	HL Paper 67-I HC 489-I
Seventh Report	Scrutiny of Bills: Further Progress Report	HL Paper 74/HC 547
Eighth Report	Scrutiny of Bills: Further Progress Report	HL Paper 90/HC 634
Ninth Report	The Case for a Children's Commissioner for England	HL Paper 96/HC 666
Tenth Report	United Nations Convention on the Rights of the Child	HL Paper 117/HC 81
Eleventh Report	Criminal Justice Bill: Further Report	HL Paper 118/HC 724
Twelfth Report	Scrutiny of Bills: Further Progress Report	HL Paper 119/HC 765
Thirteenth Report	Anti-social Behaviour Bill	HL Paper 120/HC 766

Fourteenth Report	Work of the Northern Ireland Human Rights Commission	HL Paper 132/HC 142
Fifteenth Report	Scrutiny of Bills and Draft Bills: Further Progress Report	HL Paper 149/HC 1005
Sixteenth Report	Draft Voluntary Code of Practice on Retention of Communications Data under Part 11 of the Anti-terrorism, Crime and Security Act 2001	HL Paper 181/HC 1272
Seventeenth Report	Scrutiny of Bills: Final Progress Report	HL Paper 186/HC 1278
Eighteenth Report	The Government's Response to the Committee's Tenth Report of Session 2002-03 on the UN Convention on the Rights of the Child	HL Paper 187/HC 1279
Nineteenth Report	Draft Gender Recognition Bill Vol I: Report	HL Paper 188-I/HC 1276-I
Nineteenth Report	Draft Gender Recognition Bill Vol II: Evidence	HL Paper 188-II/HC 1276-II

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First Report	Homelessness Bill	HL Paper 30/HC 314
Second Report	Anti-terrorism, Crime and Security Bill	HL Paper 37/HC 372
Third Report	Proceeds of Crime Bill	HL Paper 43/HC 405
Fourth Report	Sex Discrimination (Election Candidates) Bill	HL Paper 44/HC 406
Fifth Report	Anti-terrorism, Crime and Security Bill: Further Report	HL Paper 51/HC 420
Sixth Report	The Mental Health Act 1983 (Remedial) Order 2001	HL Paper 57/HC 472
Seventh Report	Making of Remedial Orders	HL Paper 58/HC 473
Eighth Report	Tobacco Advertising and Promotion Bill	HL Paper 59/HC 474
Ninth Report	Scrutiny of Bills: Progress Report	HL Paper 60/HC 475
Tenth Report	Animal Health Bill	HL Paper 67/HC 542
Eleventh Report	Proceeds of Crime: Further Report	HL Paper 75/HC 596
Twelfth Report	Employment Bill	HL Paper 85/HC 645
Thirteenth Report	Police Reform Bill	HL Paper 86/HC 646
Fourteenth Report	Scrutiny of Bills: Private Members' Bills and Private Bills	HL Paper 93/HC 674

Fifteenth Report	Police Reform Bill: Further Report	HL Paper 98/HC 706
Sixteenth Report	Scrutiny of Bills: Further Progress Report	HL Paper 113/ HC 805
Seventeenth Report	Nationality, Immigration and Asylum Bill	HL Paper 132/ HC 961
Eighteenth Report	Scrutiny of Bills: Further Progress Report	HL Paper 133/ HC 962
Nineteenth Report	Draft Communications Bill	HL Paper 149 HC 1102
Twentieth Report	Draft Extradition Bill	HL Paper 158/ HC 1140
Twenty-first Report	Scrutiny of Bills: Further Progress Report	HL Paper 159/ HC 1141
Twenty-second Report	The Case for a Human Rights Commission	HL Paper 160/ HC 1142
Twenty-third Report	Nationality, Immigration and Asylum Bill: Further Report	HL Paper 176/ HC 1255
Twenty-fourth Report	Adoption and children Bill: As amended by the House of Lords on Report	HL Paper 177/ HC 979
Twenty-fifth Report	Draft Mental Health Bill	HL Paper 181/ HC 1294
Twenty-sixth Report	Scrutiny of Bills: Final Progress Report	HL Paper 182/ HC 1295

I

(Acts whose publication is obligatory)

**REGULATION (EC) No 45/2001 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 18 December 2000
on the protection of individuals with regard to the processing of personal data by the Community
institutions and bodies and on the free movement of such data**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE
EUROPEAN UNION,

Having regard to the Treaty establishing the European
Community, and in particular Article 286 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the Economic and Social
Committee ⁽²⁾,

Acting in accordance with the procedure laid down in Article
251 of the Treaty ⁽³⁾,

Whereas:

- (5) A Regulation is necessary to provide the individual with legally enforceable rights, to specify the data processing obligations of the controllers within the Community institutions and bodies, and to create an independent supervisory authority responsible for monitoring the processing of personal data by the Community institutions and bodies.
- (6) The Working Party on the Protection of Individuals with regard to the Processing of Personal Data set up under Article 29 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ⁽⁴⁾ has been consulted.
- (7) The persons to be protected are those whose personal data are processed by Community institutions or bodies in any context whatsoever, for example because they are employed by those institutions or bodies.
- (8) The principles of data protection should apply to any information concerning an identified or identifiable person. To determine whether a person is identifiable, account should be taken of all the means likely to be reasonably used either by the controller or by any other person to identify the said person. The principles of protection should not apply to data rendered anonymous in such a way that the data subject is no longer identifiable.
- (9) Directive 95/46/EC requires Member States to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data, in order to ensure the free flow of personal data in the Community.
- (1) Article 286 of the Treaty requires the application to the Community institutions and bodies of the Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data.
- (2) A fully-fledged system of protection of personal data not only requires the establishment of rights for data subjects and obligations for those who process personal data, but also appropriate sanctions for offenders and monitoring by an independent supervisory body.
- (3) Article 286(2) of the Treaty requires the establishment of an independent supervisory body responsible for monitoring the application of such Community acts to Community institutions and bodies.
- (4) Article 286(2) of the Treaty requires the adoption of any other relevant provisions as appropriate.

⁽¹⁾ OJ C 376E, 28.12.1999, p. 24.

⁽²⁾ OJ C 51, 23.2.2000, p. 48.

⁽³⁾ Opinion of the European Parliament of 14 November 2000 and Council Decision of 30 November 2000.

⁽⁴⁾ OJ L 281, 23.11.1995, p. 31.

- (10) Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector⁽¹⁾ specifies and adds to Directive 95/46/EC with respect to the processing of personal data in the telecommunications sector.
- (11) Various other Community measures, including measures on mutual assistance between national authorities and the Commission, are also designed to specify and add to Directive 95/46/EC in the sectors to which they relate.
- (12) Consistent and homogeneous application of the rules for the protection of individuals' fundamental rights and freedoms with regard to the processing of personal data should be ensured throughout the Community.
- (13) The aim is to ensure both effective compliance with the rules governing the protection of individuals' fundamental rights and freedoms and the free flow of personal data between Member States and the Community institutions and bodies or between the Community institutions and bodies for purposes connected with the exercise of their respective competences.
- (14) To this end measures should be adopted which are binding on the Community institutions and bodies. These measures should apply to all processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law.
- (15) Where such processing is carried out by Community institutions or bodies in the exercise of activities falling outside the scope of this Regulation, in particular those laid down in Titles V and VI of the Treaty on European Union, the protection of individuals' fundamental rights and freedoms shall be ensured with due regard to Article 6 of the Treaty on European Union. Access to documents, including conditions for access to documents containing personal data, is governed by the rules adopted on the basis of Article 255 of the EC Treaty the scope of which includes Titles V and VI of the Treaty on European Union.
- (16) The measures should not apply to bodies established outside the Community framework, nor should the European Data Protection Supervisor be competent to monitor the processing of personal data by such bodies.
- (17) The effectiveness of the protection of individuals with regard to the processing of personal data in the Union presupposes the consistency of the relevant rules and procedures applicable to activities pertaining to different legal contexts. The development of fundamental principles on the protection of personal data in the fields of
- judicial cooperation in criminal affairs and police and customs cooperation, and the setting-up of a secretariat for the joint supervisory authorities established by the Europol Convention, the Convention on the Use of Information Technology for Customs Purposes and the Schengen Convention represent a first step in this regard.
- (18) This Regulation should not affect the rights and obligations of Member States under Directives 95/46/EC and 97/66/EC. It is not intended to change existing procedures and practices lawfully implemented by the Member States in the field of national security, prevention of disorder or prevention, detection, investigation and prosecution of criminal offences in compliance with the Protocol on Privileges and Immunities of the European Communities and with international law.
- (19) The Community institutions and bodies should inform the competent authorities in the Member States when they consider that communications on their telecommunications networks should be intercepted, in keeping with the national provisions applicable.
- (20) The provisions applicable to the Community institutions and bodies should correspond to those provisions laid down in connection with the harmonisation of national laws or the implementation of other Community policies, notably in the mutual assistance sphere. It may be necessary, however, to specify and add to those provisions when it comes to ensuring protection in the case of the processing of personal data by the Community institutions and bodies.
- (21) This holds true for the rights of the individuals whose data are being processed, for the obligations of the Community institutions and bodies doing the processing, and for the powers to be vested in the independent supervisory authority responsible for ensuring that this Regulation is properly applied.
- (22) The rights accorded the data subject and the exercise thereof should not affect the obligations placed on the controller.
- (23) The independent supervisory authority should exercise its supervisory functions in accordance with the Treaty and in compliance with human rights and fundamental freedoms. It should conduct its enquiries in compliance with the Protocol on Privileges and Immunities and with the Staff Regulations of Officials of the European Communities and the conditions of employment applicable to Other Servants of the Communities.
- (24) The necessary technical measures should be adopted to allow access to the registers of processing operations carried out by Data Protection Officers through the independent supervisory authority.

⁽¹⁾ OJ L 24, 30.1.1998, p. 1.

- (25) The decisions of the independent supervisory authority regarding exemptions, guarantees, authorisations and conditions relating to data processing operations, as defined in this Regulation, should be published in the activities report. Independently of the publication of an annual activities report, the independent supervisory authority may publish reports on specific subjects.
- (26) Certain processing operations likely to present specific risks with respect to the rights and freedoms of data subjects are subject to prior checking by the independent supervisory authority. The opinion given in the context of such prior checking, including the opinion resulting from failure to reply within the set period, should be without prejudice to the subsequent exercise by the independent supervisory authority of its powers with regard to the processing operation in question.
- (27) Processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies.
- (28) In certain cases the processing of data should be authorised by Community provisions or by acts transposing Community provisions. Nevertheless, in the transitional period during which such provisions do not exist, pending their adoption, the European Data Protection Supervisor may authorise processing of such data provided that adequate safeguards are adopted. In so doing, he should take account in particular of the provisions adopted by the Member States to deal with similar cases.
- (29) These cases concern the processing of data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade-union membership and the processing of data concerning health or sex life which are necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law or for reasons of substantial public interest. They also concern the processing of data relating to offences, criminal convictions or security measures and authorisation to apply a decision to the data subject which produces legal effects concerning him or her or significantly affects him or her and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him or her.
- (30) It may be necessary to monitor the computer networks operated under the control of the Community institutions and bodies for the purposes of prevention of unauthorised use. The European Data Protection Supervisor should determine whether and under what conditions that is possible.
- (31) Liability arising from any breach of this Regulation is governed by the second paragraph of Article 288 of the Treaty.
- (32) In each Community institution or body one or more Data Protection Officers should ensure that the provisions of this Regulation are applied and should advise controllers on fulfilling their obligations.
- (33) Under Article 21 of Council Regulation (EC) No 322/97 of 17 February 1997 on Community statistics ⁽¹⁾, that Regulation is to apply without prejudice to Directive 95/46/EC.
- (34) Under Article 8(8) of Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank ⁽²⁾, that Regulation is to apply without prejudice to Directive 95/46/EC.
- (35) Under Article 1(2) of Council Regulation (Euratom, EEC) No 1588/90 of 11 June 1990 on the transmission of data subject to statistical confidentiality to the Statistical Office of the European Communities ⁽³⁾, that Regulation does not derogate from the special Community or national provisions concerning the safeguarding of confidentiality other than statistical confidentiality.
- (36) This Regulation does not aim to limit Member States' room for manoeuvre in drawing up their national laws on data protection under Article 32 of Directive 95/46/EC, in accordance with Article 249 of the Treaty,
- HAVE ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Object of the Regulation

1. In accordance with this Regulation, the institutions and bodies set up by, or on the basis of, the Treaties establishing the European Communities, hereinafter referred to as 'Community institutions or

⁽¹⁾ OJ L 52, 22.2.1997, p. 1.

⁽²⁾ OJ L 318, 27.11.1998, p. 8.

⁽³⁾ OJ L 151, 15. 6.1990, p. 1. Regulation as amended by Regulation (EC) No 322/97 (OJ L 52, 22.2.1997, p. 1).

bodies', shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data and shall neither restrict nor prohibit the free flow of personal data between themselves or to recipients subject to the national law of the Member States implementing Directive 95/46/EC.

2. The independent supervisory authority established by this Regulation, hereinafter referred to as the European Data Protection Supervisor, shall monitor the application of the provisions of this Regulation to all processing operations carried out by a Community institution or body.

Article 2

Definitions

For the purposes of this Regulation:

- (a) 'personal data' shall mean any information relating to an identified or identifiable natural person hereinafter referred to as 'data subject'; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity;
- (b) 'processing of personal data' hereinafter referred to as 'processing' shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;
- (c) 'personal data filing system' hereinafter referred to as 'filing system' shall mean any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis;
- (d) 'controller' shall mean the Community institution or body, the Directorate-General, the unit or any other organisational entity which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by a specific Community act, the controller or the specific criteria for its nomination may be designated by such Community act;
- (e) 'processor' shall mean a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller;
- (f) 'third party' shall mean a natural or legal person, public authority, agency or body other than the data subject, the controller, the processor and the persons who, under the direct authority of the controller or the processor, are authorised to process the data;
- (g) 'recipient' shall mean a natural or legal person, public authority, agency or any other body to whom data are disclosed, whether a third party or not; however, authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients;
- (h) 'the data subject's consent' shall mean any freely given specific and informed indication of his or her wishes by which the data subject signifies his or her agreement to personal data relating to him or her being processed.

Article 3

Scope

1. This Regulation shall apply to the processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law.

2. This Regulation shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.

CHAPTER II

GENERAL RULES ON THE LAWFULNESS OF THE PROCESSING OF PERSONAL DATA

SECTION 1

PRINCIPLES RELATING TO DATA QUALITY

Article 4

Data quality

1. Personal data must be:
 - (a) processed fairly and lawfully;
 - (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of personal data for historical, statistical or scientific purposes shall not be considered incompatible provided that the controller provides appropriate safeguards, in particular to ensure that the data are not processed for any other purposes or used in support of measures or decisions regarding any particular individual;
 - (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
 - (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;
 - (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. The Community institution or body shall lay down that personal data which are to be stored for longer periods for historical, statistical or scientific use should be kept either in anonymous form only or, if that is not possible, only with the identity of the data subjects encrypted. In any event, the data shall not be used for any purpose other than for historical, statistical or scientific purposes.
2. It shall be for the controller to ensure that paragraph 1 is complied with.

SECTION 2

CRITERIA FOR MAKING DATA PROCESSING LEGITIMATE

Article 5

Lawfulness of processing

Personal data may be processed only if:

- (a) processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body or in a third party to whom the data are disclosed, or

- (b) processing is necessary for compliance with a legal obligation to which the controller is subject, or
- (c) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract, or
- (d) the data subject has unambiguously given his or her consent, or
- (e) processing is necessary in order to protect the vital interests of the data subject.

Article 6

Change of purpose

Without prejudice to Articles 4, 5 and 10:

1. Personal data shall only be processed for purposes other than those for which they have been collected if the change of purpose is expressly permitted by the internal rules of the Community institution or body.
2. Personal data collected exclusively for ensuring the security or the control of the processing systems or operations shall not be used for any other purpose, with the exception of the prevention, investigation, detection and prosecution of serious criminal offences.

Article 7

Transfer of personal data within or between Community institutions or bodies

Without prejudice to Articles 4, 5, 6 and 10:

1. Personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient.
2. Where the data are transferred following a request from the recipient, both the controller and the recipient shall bear the responsibility for the legitimacy of this transfer.

The controller shall be required to verify the competence of the recipient and to make a provisional evaluation of the necessity for the transfer of the data. If doubts arise as to this necessity, the controller shall seek further information from the recipient.

The recipient shall ensure that the necessity for the transfer of the data can be subsequently verified.

3. The recipient shall process the personal data only for the purposes for which they were transmitted.

Article 8

Transfer of personal data to recipients, other than Community institutions and bodies, subject to Directive 95/46/EC

Without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC,

- (a) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, or
- (b) if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.

*Article 9***Transfer of personal data to recipients, other than Community institutions and bodies, which are not subject to Directive 95/46/EC**

1. Personal data shall only be transferred to recipients, other than Community institutions and bodies, which are not subject to national law adopted pursuant to Directive 95/46/EC, if an adequate level of protection is ensured in the country of the recipient or within the recipient international organisation and the data are transferred solely to allow tasks covered by the competence of the controller to be carried out.

2. The adequacy of the level of protection afforded by the third country or international organisation in question shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the recipient third country or recipient international organisation, the rules of law, both general and sectoral, in force in the third country or international organisation in question and the professional rules and security measures which are complied with in that third country or international organisation.

3. The Community institutions and bodies shall inform the Commission and the European Data Protection Supervisor of cases where they consider the third country or international organisation in question does not ensure an adequate level of protection within the meaning of paragraph 2.

4. The Commission shall inform the Member States of any cases as referred to in paragraph 3.

5. The Community institutions and bodies shall take the necessary measures to comply with decisions taken by the Commission when it establishes, pursuant to Article 25(4) and (6) of Directive 95/46/EC, that a third country or an international organisation ensures or does not ensure an adequate level of protection.

6. By way of derogation from paragraphs 1 and 2, the Community institution or body may transfer personal data if:

- (a) the data subject has given his or her consent unambiguously to the proposed transfer; or
- (b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken in response to the data subject's request; or
- (c) the transfer is necessary for the conclusion or performance of a contract entered into in the interest of the data subject between the controller and a third party; or
- (d) the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims; or
- (e) the transfer is necessary in order to protect the vital interests of the data subject; or
- (f) the transfer is made from a register which, according to Community law, is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate a legitimate interest, to the extent that the conditions laid down in Community law for consultation are fulfilled in the particular case.

7. Without prejudice to paragraph 6, the European Data Protection Supervisor may authorise a transfer or a set of transfers of personal data to a third country or international organisation which does not ensure an adequate level of protection within the meaning of paragraphs 1 and 2, where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights; such safeguards may in particular result from appropriate contractual clauses.

8. The Community institutions and bodies shall inform the European Data Protection Supervisor of categories of cases where they have applied paragraphs 6 and 7.

SECTION 3

SPECIAL CATEGORIES OF PROCESSING*Article 10***The processing of special categories of data**

1. The processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and of data concerning health or sex life, are prohibited.
2. Paragraph 1 shall not apply where:
 - (a) the data subject has given his or her express consent to the processing of those data, except where the internal rules of the Community institution or body provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject's giving his or her consent, or
 - (b) processing is necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof, or, if necessary, insofar as it is agreed upon by the European Data Protection Supervisor, subject to adequate safeguards, or
 - (c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his or her consent, or
 - (d) processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims, or
 - (e) processing is carried out in the course of its legitimate activities with appropriate safeguards by a non-profit-seeking body which constitutes an entity integrated in a Community institution or body, not subject to national data protection law by virtue of Article 4 of Directive 95/46/EC, and with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of this body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects.
3. Paragraph 1 shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy.
4. Subject to the provision of appropriate safeguards, and for reasons of substantial public interest, exemptions in addition to those laid down in paragraph 2 may be laid down by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by decision of the European Data Protection Supervisor.
5. Processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor, subject to appropriate specific safeguards.
6. The European Data Protection Supervisor shall determine the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body.

SECTION 4

INFORMATION TO BE GIVEN TO THE DATA SUBJECT

*Article 11***Information to be supplied where the data have been obtained from the data subject**

1. The controller shall provide a data subject from whom data relating to himself/herself are collected with at least the following information, except where he or she already has it:

- (a) the identity of the controller;
- (b) the purposes of the processing operation for which the data are intended;
- (c) the recipients or categories of recipients of the data;
- (d) whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply;
- (e) the existence of the right of access to, and the right to rectify, the data concerning him or her;
- (f) any further information such as:
 - (i) the legal basis of the processing operation for which the data are intended,
 - (ii) the time-limits for storing the data,
 - (iii) the right to have recourse at any time to the European Data Protection Supervisor,

insofar as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.

2. By way of derogation from paragraph 1, the provision of information or part of it, except for the information referred to in paragraph 1(a), (b) and (d), may be deferred as long as this is necessary for statistical purposes. The information must be provided as soon as the reason for which the information is withheld ceases to exist.

*Article 12***Information to be supplied where the data have not been obtained from the data subject**

1. Where the data have not been obtained from the data subject, the controller shall at the time of undertaking the recording of personal data or, if a disclosure to a third party is envisaged, no later than the time when the data are first disclosed, provide the data subject with at least the following information, except where he or she already has it:

- (a) the identity of the controller;
- (b) the purposes of the processing operation;
- (c) the categories of data concerned;
- (d) the recipients or categories of recipients;
- (e) the existence of the right of access to, and the right to rectify, the data concerning him or her;
- (f) any further information such as:
 - (i) the legal basis of the processing operation for which the data are intended,
 - (ii) the time-limits for storing the data,
 - (iii) the right to have recourse at any time to the European Data Protection Supervisor,

- (iv) the origin of the data, except where the controller cannot disclose this information for reasons of professional secrecy,

insofar as such further information is necessary, having regard to the specific circumstances in which the data are processed, to guarantee fair processing in respect of the data subject.

2. Paragraph 1 shall not apply where, in particular for processing for statistical purposes or for the purposes of historical or scientific research, the provision of such information proves impossible or would involve a disproportionate effort or if recording or disclosure is expressly laid down by Community law. In these cases the Community institution or body shall provide for appropriate safeguards after consulting the European Data Protection Supervisor.

SECTION 5

RIGHTS OF THE DATA SUBJECT

Article 13

Right of access

The data subject shall have the right to obtain, without constraint, at any time within three months from the receipt of the request and free of charge from the controller:

- (a) confirmation as to whether or not data related to him or her are being processed;
- (b) information at least as to the purposes of the processing operation, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed;
- (c) communication in an intelligible form of the data undergoing processing and of any available information as to their source;
- (d) knowledge of the logic involved in any automated decision process concerning him or her.

Article 14

Rectification

The data subject shall have the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data.

Article 15

Blocking

1. The data subject shall have the right to obtain from the controller the blocking of data where:
 - (a) their accuracy is contested by the data subject, for a period enabling the controller to verify the accuracy, including the completeness, of the data, or;
 - (b) the controller no longer needs them for the accomplishment of its tasks but they have to be maintained for purposes of proof, or;
 - (c) the processing is unlawful and the data subject opposes their erasure and demands their blocking instead.
2. In automated filing systems blocking shall in principle be ensured by technical means. The fact that the personal data are blocked shall be indicated in the system in such a way that it becomes clear that the personal data may not be used.
3. Personal data blocked pursuant to this Article shall, with the exception of their storage, only be processed for purposes of proof, or with the data subject's consent, or for the protection of the rights of a third party.

4. The data subject who requested and obtained the blocking of his or her data shall be informed by the controller before the data are unblocked.

Article 16

Erasure

The data subject shall have the right to obtain from the controller the erasure of data if their processing is unlawful, particularly where the provisions of Sections 1, 2 and 3 of Chapter II have been infringed.

Article 17

Notification to third parties

The data subject shall have the right to obtain from the controller the notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking pursuant to Articles 13 to 16 unless this proves impossible or involves a disproportionate effort.

Article 18

The data subject's right to object

The data subject shall have the right:

- (a) to object at any time, on compelling legitimate grounds relating to his or her particular situation, to the processing of data relating to him or her, except in the cases covered by Article 5(b), (c) and (d). Where there is a justified objection, the processing in question may no longer involve those data;
- (b) to be informed before personal data are disclosed for the first time to third parties or before they are used on their behalf for the purposes of direct marketing, and to be expressly offered the right to object free of charge to such disclosure or use.

Article 19

Automated individual decisions

The data subject shall have the right not to be subject to a decision which produces legal effects concerning him or her or significantly affects him or her and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him or her, such as his or her performance at work, reliability or conduct, unless the decision is expressly authorised pursuant to national or Community legislation or, if necessary, by the European Data Protection Supervisor. In either case, measures to safeguard the data subject's legitimate interests, such as arrangements allowing him or her to put his or her point of view, must be taken.

SECTION 6

EXEMPTIONS AND RESTRICTIONS

Article 20

Exemptions and restrictions

1. The Community institutions and bodies may restrict the application of Article 4(1), Article 11, Article 12(1), Articles 13 to 17 and Article 37(1) where such restriction constitutes a necessary measure to safeguard:

- (a) the prevention, investigation, detection and prosecution of criminal offences;
- (b) an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters;
- (c) the protection of the data subject or of the rights and freedoms of others;

- (d) the national security, public security or defence of the Member States;
- (e) a monitoring, inspection or regulatory task connected, even occasionally, with the exercise of official authority in the cases referred to in (a) and (b).

2. Articles 13 to 16 shall not apply when data are processed solely for purposes of scientific research or are kept in personal form for a period which does not exceed the period necessary for the sole purpose of compiling statistics, provided that there is clearly no risk of breaching the privacy of the data subject and that the controller provides adequate legal safeguards, in particular to ensure that the data are not used for taking measures or decisions regarding particular individuals.

3. If a restriction provided for by paragraph 1 is imposed, the data subject shall be informed, in accordance with Community law, of the principal reasons on which the application of the restriction is based and of his or her right to have recourse to the European Data Protection Supervisor.

4. If a restriction provided for by paragraph 1 is relied upon to deny access to the data subject, the European Data Protection Supervisor shall, when investigating the complaint, only inform him or her of whether the data have been processed correctly and, if not, whether any necessary corrections have been made.

5. Provision of the information referred to under paragraphs 3 and 4 may be deferred for as long as such information would deprive the restriction imposed by paragraph 1 of its effect.

SECTION 7

CONFIDENTIALITY AND SECURITY OF PROCESSING

Article 21

Confidentiality of processing

A person employed with a Community institution or body and any Community institution or body itself acting as processor, with access to personal data, shall not process them except on instructions from the controller, unless required to do so by national or Community law.

Article 22

Security of processing

1. Having regard to the state of the art and the cost of their implementation, the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected.

Such measures shall be taken in particular to prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing.

2. Where personal data are processed by automated means, measures shall be taken as appropriate in view of the risks in particular with the aim of:

- (a) preventing any unauthorised person from gaining access to computer systems processing personal data;
- (b) preventing any unauthorised reading, copying, alteration or removal of storage media;
- (c) preventing any unauthorised memory inputs as well as any unauthorised disclosure, alteration or erasure of stored personal data;

- (d) preventing unauthorised persons from using data-processing systems by means of data transmission facilities;
- (e) ensuring that authorised users of a data-processing system can access no personal data other than those to which their access right refers;
- (f) recording which personal data have been communicated, at what times and to whom;
- (g) ensuring that it will subsequently be possible to check which personal data have been processed, at what times and by whom;
- (h) ensuring that personal data being processed on behalf of third parties can be processed only in the manner prescribed by the contracting institution or body;
- (i) ensuring that, during communication of personal data and during transport of storage media, the data cannot be read, copied or erased without authorisation;
- (j) designing the organisational structure within an institution or body in such a way that it will meet the special requirements of data protection.

Article 23

Processing of personal data on behalf of controllers

1. Where a processing operation is carried out on its behalf, the controller shall choose a processor providing sufficient guarantees in respect of the technical and organisational security measures required by Article 22 and ensure compliance with those measures.
2. The carrying out of a processing operation by way of a processor shall be governed by a contract or legal act binding the processor to the controller and stipulating in particular that:
 - (a) the processor shall act only on instructions from the controller;
 - (b) the obligations set out in Articles 21 and 22 shall also be incumbent on the processor unless, by virtue of Article 16 or Article 17(3), second indent, of Directive 95/46/EC, the processor is already subject to obligations with regard to confidentiality and security laid down in the national law of one of the Member States.
3. For the purposes of keeping proof, the parts of the contract or the legal act relating to data protection and the requirements relating to the measures referred to in Article 22 shall be in writing or in another equivalent form.

SECTION 8

DATA PROTECTION OFFICER

Article 24

Appointment and tasks of the Data Protection Officer

1. Each Community institution and Community body shall appoint at least one person as data protection officer. That person shall have the task of:
 - (a) ensuring that controllers and data subjects are informed of their rights and obligations pursuant to this Regulation;
 - (b) responding to requests from the European Data Protection Supervisor and, within the sphere of his or her competence, cooperating with the European Data Protection Supervisor at the latter's request or on his or her own initiative;
 - (c) ensuring in an independent manner the internal application of the provisions of this Regulation;

- (d) keeping a register of the processing operations carried out by the controller, containing the items of information referred to in Article 25(2);
- (e) notifying the European Data Protection Supervisor of the processing operations likely to present specific risks within the meaning of Article 27.

That person shall thus ensure that the rights and freedoms of the data subjects are unlikely to be adversely affected by the processing operations.

2. The Data Protection Officer shall be selected on the basis of his or her personal and professional qualities and, in particular, his or her expert knowledge of data protection.
3. The selection of the Data Protection Officer shall not be liable to result in a conflict of interests between his or her duty as Data Protection Officer and any other official duties, in particular in relation to the application of the provisions of this Regulation.
4. The Data Protection Officer shall be appointed for a term of between two and five years. He or she shall be eligible for reappointment up to a maximum total term of ten years. He or she may be dismissed from the post of Data Protection Officer by the Community institution or body which appointed him or her only with the consent of the European Data Protection Supervisor, if he or she no longer fulfils the conditions required for the performance of his or her duties.
5. After his or her appointment the Data Protection Officer shall be registered with the European Data Protection Supervisor by the institution or body which appointed him or her.
6. The Community institution or body which appointed the Data Protection Officer shall provide him or her with the staff and resources necessary to carry out his or her duties.
7. With respect to the performance of his or her duties, the Data Protection Officer may not receive any instructions.
8. Further implementing rules concerning the Data Protection Officer shall be adopted by each Community institution or body in accordance with the provisions in the Annex. The implementing rules shall in particular concern the tasks, duties and powers of the Data Protection Officer.

Article 25

Notification to the Data Protection Officer

1. The controller shall give prior notice to the Data Protection Officer of any processing operation or set of such operations intended to serve a single purpose or several related purposes.
2. The information to be given shall include:
 - (a) the name and address of the controller and an indication of the organisational parts of an institution or body entrusted with the processing of personal data for a particular purpose;
 - (b) the purpose or purposes of the processing;
 - (c) a description of the category or categories of data subjects and of the data or categories of data relating to them;
 - (d) the legal basis of the processing operation for which the data are intended;
 - (e) the recipients or categories of recipient to whom the data might be disclosed;
 - (f) a general indication of the time limits for blocking and erasure of the different categories of data;
 - (g) proposed transfers of data to third countries or international organisations;
 - (h) a general description allowing a preliminary assessment to be made of the appropriateness of the measures taken pursuant to Article 22 to ensure security of processing.

3. Any change affecting information referred to in paragraph 2 shall be notified promptly to the Data Protection Officer.

Article 26

Register

A register of processing operations notified in accordance with Article 25 shall be kept by each Data Protection Officer.

The registers shall contain at least the information referred to in Article 25(2)(a) to (g). The registers may be inspected by any person directly or indirectly through the European Data Processing Supervisor.

SECTION 9

PRIOR CHECKING BY THE EUROPEAN DATA PROTECTION SUPERVISOR AND OBLIGATION TO COOPERATE

Article 27

Prior checking

1. Processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes shall be subject to prior checking by the European Data Protection Supervisor.

2. The following processing operations are likely to present such risks:

- (a) processing of data relating to health and to suspected offences, offences, criminal convictions or security measures;
- (b) processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct;
- (c) processing operations allowing linkages not provided for pursuant to national or Community legislation between data processed for different purposes;
- (d) processing operations for the purpose of excluding individuals from a right, benefit or contract.

3. The prior checks shall be carried out by the European Data Protection Supervisor following receipt of a notification from the Data Protection Officer who, in case of doubt as to the need for prior checking, shall consult the European Data Protection Supervisor.

4. The European Data Protection Supervisor shall deliver his or her opinion within two months following receipt of the notification. This period may be suspended until the European Data Protection Supervisor has obtained any further information that he or she may have requested. When the complexity of the matter so requires, this period may also be extended for a further two months, by decision of the European Data Protection Supervisor. This decision shall be notified to the controller prior to expiry of the initial two-month period.

If the opinion has not been delivered by the end of the two-month period, or any extension thereof, it shall be deemed to be favourable.

If the opinion of the European Data Protection Supervisor is that the notified processing may involve a breach of any provision of this Regulation, he or she shall where appropriate make proposals to avoid such breach. Where the controller does not modify the processing operation accordingly, the European Data Protection Supervisor may exercise the powers granted to him or her under Article 47(1).

5. The European Data Protection Supervisor shall keep a register of all processing operations that have been notified to him or her pursuant to paragraph 2. The register shall contain the information referred to in Article 25 and shall be open to public inspection.

*Article 28***Consultation**

1. The Community institutions and bodies shall inform the European Data Protection Supervisor when drawing up administrative measures relating to the processing of personal data involving a Community institution or body alone or jointly with others.
2. When it adopts a legislative proposal relating to the protection of individuals' rights and freedoms with regard to the processing of personal data, the Commission shall consult the European Data Protection Supervisor.

*Article 29***Obligation to provide information**

The Community institutions and bodies shall inform the European Data Protection Supervisor of the measures taken further to his or her decisions or authorisations as referred to in Article 46(h).

*Article 30***Obligation to cooperate**

At his or her request, controllers shall assist the European Data Protection Supervisor in the performance of his or her duties, in particular by providing the information referred to in Article 47(2)(a) and by granting access as provided in Article 47(2)(b).

*Article 31***Obligation to react to allegations**

In response to the European Data Protection Supervisor's exercise of his or her powers under Article 47(1)(b), the controller concerned shall inform the Supervisor of its views within a reasonable period to be specified by the Supervisor. The reply shall also include a description of the measures taken, if any, in response to the remarks of the European Data Protection Supervisor.

CHAPTER III

REMEDIES*Article 32***Remedies**

1. The Court of Justice of the European Communities shall have jurisdiction to hear all disputes which relate to the provisions of this Regulation, including claims for damages.
2. Without prejudice to any judicial remedy, every data subject may lodge a complaint with the European Data Protection Supervisor if he or she considers that his or her rights under Article 286 of the Treaty have been infringed as a result of the processing of his or her personal data by a Community institution or body.

In the absence of a response by the European Data Protection Supervisor within six months, the complaint shall be deemed to have been rejected.
3. Actions against decisions of the European Data Protection Supervisor shall be brought before the Court of Justice of the European Communities.
4. Any person who has suffered damage because of an unlawful processing operation or any action incompatible with this Regulation shall have the right to have the damage made good in accordance with Article 288 of the Treaty.

*Article 33***Complaints by Community staff**

Any person employed with a Community institution or body may lodge a complaint with the European Data Protection Supervisor regarding an alleged breach of the provisions of this Regulation governing the processing of personal data, without acting through official channels. No-one shall suffer prejudice on account of a complaint lodged with the European Data Protection Supervisor alleging a breach of the provisions governing the processing of personal data.

CHAPTER IV

PROTECTION OF PERSONAL DATA AND PRIVACY IN THE CONTEXT OF INTERNAL TELECOMMUNICATIONS NETWORKS*Article 34***Scope**

Without prejudice to the other provisions of this Regulation, this Chapter shall apply to the processing of personal data in connection with the use of telecommunications networks or terminal equipment operated under the control of a Community institution or body.

For the purposes of this Chapter, 'user' shall mean any natural person using a telecommunications network or terminal equipment operated under the control of a Community institution or body.

*Article 35***Security**

1. The Community institutions and bodies shall take appropriate technical and organisational measures to safeguard the secure use of the telecommunications networks and terminal equipment, if necessary in conjunction with the providers of publicly available telecommunications services or the providers of public telecommunications networks. Having regard to the state of the art and the cost of their implementation, these measures shall ensure a level of security appropriate to the risk presented.

2. In the event of any particular risk of a breach of the security of the network and terminal equipment, the Community institution or body concerned shall inform users of the existence of that risk and of any possible remedies and alternative means of communication.

*Article 36***Confidentiality of communications**

Community institutions and bodies shall ensure the confidentiality of communications by means of telecommunications networks and terminal equipment, in accordance with the general principles of Community law.

*Article 37***Traffic and billing data**

1. Without prejudice to the provisions of paragraphs 2, 3 and 4, traffic data relating to users which are processed and stored to establish calls and other connections over the telecommunications network shall be erased or made anonymous upon termination of the call or other connection.

2. If necessary, traffic data as indicated in a list agreed by the European Data Protection Supervisor may be processed for the purpose of telecommunications budget and traffic management, including the verification of authorised use of the telecommunications systems. These data shall be erased or made anonymous as soon as possible and no later than six months after collection, unless they need to be kept for a longer period to establish, exercise or defend a right in a legal claim pending before a court.

3. Processing of traffic and billing data shall only be carried out by persons handling billing, traffic or budget management.

4. Users of the telecommunication networks shall have the right to receive non-itemised bills or other records of calls made.

*Article 38***Directories of users**

1. Personal data contained in printed or electronic directories of users and access to such directories shall be limited to what is strictly necessary for the specific purposes of the directory.

2. The Community institutions and bodies shall take all the necessary measures to prevent personal data contained in those directories, regardless of whether they are accessible to the public or not, from being used for direct marketing purposes.

Article 39

Presentation and restriction of calling and connected line identification

1. Where presentation of calling-line identification is offered, the calling user shall have the possibility via a simple means, free of charge, to eliminate the presentation of the calling-line identification.
2. Where presentation of calling-line identification is offered, the called user shall have the possibility via a simple means, free of charge, to prevent the presentation of the calling-line identification of incoming calls.
3. Where presentation of connected-line identification is offered, the called user shall have the possibility via a simple means, free of charge, to eliminate the presentation of the connected-line identification to the calling user.
4. Where presentation of calling or connected-line identification is offered, the Community institutions and bodies shall inform the users thereof and of the possibilities set out in paragraphs 1, 2 and 3.

Article 40

Derogations

Community institutions and bodies shall ensure that there are transparent procedures governing the way in which they may override the elimination of the presentation of calling-line identification:

- (a) on a temporary basis, upon application of a user requesting the tracing of malicious or nuisance calls;
- (b) on a per-line basis for organisational entities dealing with emergency calls, for the purpose of answering such calls.

CHAPTER V

INDEPENDENT SUPERVISORY AUTHORITY: THE EUROPEAN DATA PROTECTION SUPERVISOR

Article 41

European Data Protection Supervisor

1. An independent supervisory authority is hereby established referred to as the European Data Protection Supervisor.
2. With respect to the processing of personal data, the European Data Protection Supervisor shall be responsible for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to privacy, are respected by the Community institutions and bodies.

The European Data Protection Supervisor shall be responsible for monitoring and ensuring the application of the provisions of this Regulation and any other Community act relating to the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data by a Community institution or body, and for advising Community institutions and bodies and data subjects on all matters concerning the processing of personal data. To these ends he or she shall fulfil the duties provided for in Article 46 and exercise the powers granted in Article 47.

Article 42

Appointment

1. The European Parliament and the Council shall appoint by common accord the European Data Protection Supervisor for a term of five years, on the basis of a list drawn up by the Commission following a public call for candidates.

An Assistant Supervisor shall be appointed in accordance with the same procedure and for the same term, who shall assist the Supervisor in all the latter's duties and act as a replacement when the Supervisor is absent or prevented from attending to them.

2. The European Data Protection Supervisor shall be chosen from persons whose independence is beyond doubt and who are acknowledged as having the experience and skills required to perform the duties of European Data Protection Supervisor, for example because they belong or have belonged to the supervisory authorities referred to in Article 28 of Directive 95/46/EC.
3. The European Data Protection Supervisor shall be eligible for reappointment.
4. Apart from normal replacement or death, the duties of the European Data Protection Supervisor shall end in the event of resignation or compulsory retirement in accordance with paragraph 5.
5. The European Data Protection Supervisor may be dismissed or deprived of his or her right to a pension or other benefits in its stead by the Court of Justice at the request of the European Parliament, the Council or the Commission, if he or she no longer fulfils the conditions required for the performance of his or her duties or if he or she is guilty of serious misconduct.
6. In the event of normal replacement or voluntary resignation, the European Data Protection Supervisor shall nevertheless remain in office until he or she has been replaced.
7. Articles 12 to 15 and 18 of the Protocol on the Privileges and Immunities of the European Communities shall also apply to the European Data Protection Supervisor.
8. Paragraphs 2 to 7 shall apply to the Assistant Supervisor.

Article 43

Regulations and general conditions governing the performance of the European Data Protection Supervisor's duties, staff and financial resources

1. The European Parliament, the Council and the Commission shall by common accord determine the regulations and general conditions governing the performance of the European Data Protection Supervisor's duties and in particular his or her salary, allowances and any other benefits in lieu of remuneration.
2. The budget authority shall ensure that the European Data Protection Supervisor is provided with the human and financial resources necessary for the performance of his or her tasks.
3. The European Data Protection Supervisor's budget shall be shown in a separate budget heading in Section VIII of the general budget of the European Union.
4. The European Data Protection Supervisor shall be assisted by a Secretariat. The officials and the other staff members of the Secretariat shall be appointed by the European Data Protection Supervisor; their superior shall be the European Data Protection Supervisor and they shall be subject exclusively to his or her direction. Their numbers shall be decided each year as part of the budgetary procedure.
5. The officials and the other staff members of the European Data Protection Supervisor's Secretariat shall be subject to the rules and regulations applicable to officials and other servants of the European Communities.
6. In matters concerning the Secretariat staff, the European Data Protection Supervisor shall have the same status as the institutions within the meaning of Article 1 of the Staff Regulations of Officials of the European Communities.

Article 44

Independence

1. The European Data Protection Supervisor shall act in complete independence in the performance of his or her duties.
2. The European Data Protection Supervisor shall, in the performance of his or her duties, neither seek nor take instructions from anybody.
3. The European Data Protection Supervisor shall refrain from any action incompatible with his or her duties and shall not, during his or her term of office, engage in any other occupation, whether gainful or not.

4. The European Data Protection Supervisor shall, after his or her term of office, behave with integrity and discretion as regards the acceptance of appointments and benefits.

Article 45

Professional secrecy

The European Data Protection Supervisor and his or her staff shall, both during and after their term of office, be subject to a duty of professional secrecy with regard to any confidential information which has come to their knowledge in the course of the performance of their official duties.

Article 46

Duties

The European Data Protection Supervisor shall:

- (a) hear and investigate complaints, and inform the data subject of the outcome within a reasonable period;
- (b) conduct inquiries either on his or her own initiative or on the basis of a complaint, and inform the data subjects of the outcome within a reasonable period;
- (c) monitor and ensure the application of the provisions of this Regulation and any other Community act relating to the protection of natural persons with regard to the processing of personal data by a Community institution or body with the exception of the Court of Justice of the European Communities acting in its judicial capacity;
- (d) advise all Community institutions and bodies, either on his or her own initiative or in response to a consultation, on all matters concerning the processing of personal data, in particular before they draw up internal rules relating to the protection of fundamental rights and freedoms with regard to the processing of personal data;
- (e) monitor relevant developments, insofar as they have an impact on the protection of personal data, in particular the development of information and communication technologies;
- (f)
 - (i) cooperate with the national supervisory authorities referred to in Article 28 of Directive 95/46/EC in the countries to which that Directive applies to the extent necessary for the performance of their respective duties, in particular by exchanging all useful information, requesting such authority or body to exercise its powers or responding to a request from such authority or body;
 - (ii) also cooperate with the supervisory data protection bodies established under Title VI of the Treaty on European Union particularly with a view to improving consistency in applying the rules and procedures with which they are respectively responsible for ensuring compliance;
- (g) participate in the activities of the Working Party on the Protection of Individuals with regard to the Processing of Personal Data set up by Article 29 of Directive 95/46/EC;
- (h) determine, give reasons for and make public the exemptions, safeguards, authorisations and conditions mentioned in Article 10(2)(b),(4), (5) and (6), in Article 12(2), in Article 19 and in Article 37(2);
- (i) keep a register of processing operations notified to him or her by virtue of Article 27(2) and registered in accordance with Article 27(5), and provide means of access to the registers kept by the Data Protection Officers under Article 26;
- (j) carry out a prior check of processing notified to him or her;
- (k) establish his or her Rules of Procedure.

*Article 47***Powers**

1. The European Data Protection Supervisor may:
 - (a) give advice to data subjects in the exercise of their rights;
 - (b) refer the matter to the controller in the event of an alleged breach of the provisions governing the processing of personal data, and, where appropriate, make proposals for remedying that breach and for improving the protection of the data subjects;
 - (c) order that requests to exercise certain rights in relation to data be complied with where such requests have been refused in breach of Articles 13 to 19;
 - (d) warn or admonish the controller;
 - (e) order the rectification, blocking, erasure or destruction of all data when they have been processed in breach of the provisions governing the processing of personal data and the notification of such actions to third parties to whom the data have been disclosed;
 - (f) impose a temporary or definitive ban on processing;
 - (g) refer the matter to the Community institution or body concerned and, if necessary, to the European Parliament, the Council and the Commission;
 - (h) refer the matter to the Court of Justice of the European Communities under the conditions provided for in the Treaty;
 - (i) intervene in actions brought before the Court of Justice of the European Communities.
2. The European Data Protection Supervisor shall have the power:
 - (a) to obtain from a controller or Community institution or body access to all personal data and to all information necessary for his or her enquiries;
 - (b) to obtain access to any premises in which a controller or Community institution or body carries on its activities when there are reasonable grounds for presuming that an activity covered by this Regulation is being carried out there.

*Article 48***Activities report**

1. The European Data Protection Supervisor shall submit an annual report on his or her activities to the European Parliament, the Council and the Commission and at the same time make it public.
2. The European Data Protection Supervisor shall forward the activities report to the other Community institutions and bodies, which may submit comments with a view to possible examination of the report in the European Parliament, in particular in relation to the description of the measures taken in response to the remarks made by the European Data Protection Supervisor under Article 31.

CHAPTER VI

FINAL PROVISIONS*Article 49***Sanctions**

Any failure to comply with the obligations pursuant to this Regulation, whether intentionally or through negligence on his or her part, shall make an official or other servant of the European Communities liable to disciplinary action, in accordance with the rules and procedures laid down in the Staff Regulations of Officials of the European Communities or in the conditions of employment applicable to other servants.

*Article 50***Transitional period**

Community institutions and bodies shall ensure that processing operations already under way on the date this Regulation enters into force are brought into conformity with this Regulation within one year of that date.

*Article 51***Entry into force**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 18 December 2000.

For the European Parliament

The President

N. FONTAINE

For the Council

The President

D. VOYNET

ANNEX

1. The Data Protection Officer may make recommendations for the practical improvement of data protection to the Community institution or body which appointed him or her and advise it and the controller concerned on matters concerning the application of data protection provisions. Furthermore he or she may, on his or her own initiative or at the request of the Community institution or body which appointed him or her, the controller, the Staff Committee concerned or any individual, investigate matters and occurrences directly relating to his or her tasks and which come to his or her notice, and report back to the person who commissioned the investigation or to the controller.
 2. The Data Protection Officer may be consulted by the Community institution or body which appointed him or her, by the controller concerned, by the Staff Committee concerned and by any individual, without going through the official channels, on any matter concerning the interpretation or application of this Regulation.
 3. No one shall suffer prejudice on account of a matter brought to the attention of the competent Data Protection Officer alleging that a breach of the provisions of this Regulation has taken place.
 4. Every controller concerned shall be required to assist the Data Protection Officer in performing his or her duties and to give information in reply to questions. In performing his or her duties, the Data Protection Officer shall have access at all times to the data forming the subject-matter of processing operations and to all offices, data-processing installations and data carriers.
 5. To the extent required, the Data Protection Officer shall be relieved of other activities. The Data Protection Officer and his or her staff, to whom Article 287 of the Treaty shall apply, shall be required not to divulge information or documents which they obtain in the course of their duties.
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Facing the Other

Facing the Other:
Interdisciplinary Studies on Race, Gender
and Social Justice in Ireland

Edited by

Borbála Faragó and Moynagh Sullivan



Cambridge Scholars Publishing

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TO IMRE AND SAMSON

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EDITORS' INTRODUCTION

BORBÁLA FARAGÓ AND MOYNAGH SULLIVAN

Facing the Other begins by facing into post-1916 Ireland and ends with facing the future. By examining the question of minorities and “others” in terms of historical presences of other races, as well as in terms of those “othered” by the state itself (religious minorities, Travellers, women and sexual minorities), it provides a unique analysis of the issues surrounding “difference” in Ireland today. Through identifying social and political questions of inclusion and exclusion based on race and minority identity as fundamental to the articulations of Irishness, the book illuminates the problems of racism and discrimination faced by contemporary Ireland in light of historical precedent and continuity.

The extraordinarily rapid economic development of Ireland over the past two decades has effected a profound transformation in every dimension of the island’s social and cultural life. In the process, old verities and assumptions concerning the nature of Irish society and culture have been called into question, with a whole variety of new challenges coming to light. A culture and society schooled in, and to some extent structured for, poverty and emigration has for the first time in centuries been forced to confront issues of large-scale immigration combined with the dilemmas associated with the generation of enormous national wealth. But in the process older societal faultlines based on gender, disability and religious difference have not disappeared; the tenacity of such divisions has been maintained, and addressed largely around concerns about visible racialization.

Moreover, while the developments of the last two decades have transformed questions of what and who constitutes the “other” within Irish society, the assignment and articulation of identities is by no means the product merely of recent events. Rather, historical processes of othering continue to play a critical role in influencing and moulding the social contours of the new Ireland of the twenty-first century.

The purpose of this collection of essays is to offer a multi-faceted investigation of the critical issue of the creation and place of the “other” in

Ireland. Its content is genuinely interdisciplinary because of the conviction that this represents the most suitable mode of engaging with and elucidating such a central problem of modern Irish life and academic discourse. Interdisciplinarity offers several notable advantages in dealing with a topic of this nature, the most obvious of these being the complementarity of different theoretical and empirical approaches by scholars trained in different academic disciplines.

Facing the Other is divided into three parts; "The Historical Other", "The Voice of the Other" and "Theorizing the Other". This structure continues the rationale of the title in which various disciplines can "face" one another, and address each other across sections as well as within their various sections. In this way we hope the spirit of dialogue and facing the other is methodologically underwritten, and a structure is provided that is coherent and inclusive.

"The Historical Other" examines representative historical contexts of othering in post-1916 Ireland. It opens with Mary E. Daly's essay, "Cultural and Economic Protection and Xenophobia in Independent Ireland, 1920s–1970s", which offers a historical account of tolerance and intolerance towards outsiders and investigates the economic, cultural and social factors influencing Irish attitudes towards non-natives in this period.. The same era is examined in a literary context in Suzanna Chan's exploration of race and gender in Joyce's *Ulysses*. Chan's essay considers the racialization both of visual culture and consciousness in early 20th century Dublin, and examines how Bloom's shape shifting can be qualified as an unsuccessful attempt to secure an unambiguous whiteness by recourse to a range of personas. A subject that is still somewhat under-represented in historical accounts of 20th-century Ireland is addressed in Lindsey Earner-Byrne's "Parading Their Poverty....: Widows in Twentieth-Century Ireland", which charts the development of welfare rights for widows. The stark reality of German-speaking refugees who arrived in Ireland in the 1930s and 40s is visited in the chapter written by Gisela Holfter, Siobhan O'Connor and Birte Schulz. Finally, Martin Dowling's examination of the recent constructedness of Ulster Scots provides a useful key to understanding the origins of political cultural movements in the 20th century, and the opportunistic nature of state funded identitarian politics.

"The Voice of the Other" focuses on representation and self-representation of racial, ethnic, social and religious others in culture and society. Anaele Diala Iroh looks at the Nigerian transnational family in his discussion of the Igbo community's organisational, constitutional and visual cultural practices in Ireland, while Carla De Tona explores the

ambivalence of Italian identity politics and investigates the ambiguities inherent in their assumed assimilation. Vera Sheridan focuses on the little-studied area of Vietnamese refugee integration in Irish society, and discusses the cultural significance of their family structures. The next two chapters illuminate issues of sexuality in 20th-century literary representations. Aintzane Legarreta Mentxaka concentrates on Irish lesbian literary tradition and explores the mental processes by which a subject becomes intelligible as lesbian to themselves and others, while Eibhear Walshe asks how the post-gay moment surfaces in contemporary Irish lesbian and gay writing. Media and film practices of “othering” is the subject of the final two essays of this section; Andrea Grunert looks at Irish Travellers on film, whereas the essay written by Eoin Devereux, Amanda Haynes and Michael J. Breen document and analyze recent Irish print media coverage of asylum seekers and refugees.

“Theorizing the Other” considers intellectual conceptualizations of “others”, looking at the ways in which such differences are intellectualized at present and also exploring new theoretical directions. This section opens with Debbie Ging’s exploration of postmodernism in her essay “Goldfish Memories? On Seeing and Hearing Marginalised Identities in Contemporary Irish Cinema”. Claire Bracken analyzes the experimental poetics of Catherine Walsh while theorizing contemporary Irish feminist discourses. Maureen Reddy looks at how codes of racialization are embedded in cultural practices and popular discourses, while Paul Delaney explores the subaltern presence of Travellers in Irish writing. Steve Loyal’s analysis of state structures illuminates how immigrants in Ireland are classified and represented. This edited volume appropriately ends with Alice Feldman’s essay, “Facing All the Others: The Legacy of Old Identities for New Belongings in Post-Emigration Ireland” which gave its title to this collection. This essay traces how codes of racial difference have existed in discourses of religious difference in Ireland and suggests how we need to understand contemporary racialization in the context of this history.

Facing the Other brings together both established and upcoming scholars that address critical aspects of Irish cultural and social practice from an interdisciplinary point of view. The collection offers a view into the varied scholarly responses to a changing Ireland, and it hopes to provoke further discussion about the diversity of contemporary Irish cultural and social production of identity, inclusions and exclusions, from multiple critical and theoretical standpoints.

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PART I:
THE HISTORICAL OTHER

CHAPTER ONE

CULTURAL AND ECONOMIC PROTECTION AND XENOPHOBIA IN INDEPENDENT IRELAND, 1920s–1970s

MARY E. DALY

The response of the independent Irish state to outsiders has been a complex one, characterised by both welcome and rejection; tolerance and intolerance. This paper provides a brief chronological account of this response, since the foundation of the state until the 1970s, together with an analysis of some of the forces that influenced the attitudes of the Irish state and its citizens. Section I gives a very brief historical background up to the 1920s. Section II examines the treatment of outsiders under Irish citizenship and nationality law—where the overall picture is liberal both with regard to the non-resident descendants of Irish emigrants and foreign-born residents. Subsequent sections move the focus from citizenship to examine the cultural and economic forces that determined practice. Section IV looks at the period from independence up to the late 1950s—a period that was characterised by cultural and economic self-sufficiency and by a high rate of emigration—all factors that militated against a welcoming attitude towards non-natives. Section V looks at the period from c. 1960 onwards—a time when cultural and economic forces appeared more favourable towards non-natives. The final section looks very briefly at contemporary Ireland and summarises some brief comments on the overall theme.

I

Invasion and settlement by outsiders are core themes in Ireland's history. The 11th century manuscript *Lebor Gabhala*—commonly known as the Book of Invasions—tells the ancient history of Ireland in terms of a series of invasions and settlements by outsiders. In the simplistic nationalist narrative of Irish history, the arrival of the Vikings or Danes at

the end of the 8th century brought to an end Ireland's Golden Age. The Battle of Clontarf, 1014, was celebrated as an Irish victory over the Vikings, despite the fact that groups of Irish and Vikings fought on both sides in the conflict. The arrival of the Normans in 1167 was commonly seen as ushering in 700 years of tribulation. Other woes in the Irish past were also associated with invaders. Immigrants were clearly identified with colonisation and religious conversion: in other words, with the supplanting of the dominant Gaelic and catholic society by a social order that was Anglo-Norman, or English and protestant. During the sixteenth and seventeenth centuries Ireland was the destination for many Scottish and English settlers, who were welcomed to Ireland by an administration that was keen to make Ireland loyal and protestant. Smaller groups of protestant settlers such as the Huguenots, the Palatines and the Moravians came from the continent to escape religious persecution; they were keenly sought by landlords who wanted to recruit hard-working protestants for their estates. By 1750 or so most of the Irish land was owned by the descendants of these settlers, and they were also in control of the Irish parliament, the legal system, the established church and the one university.

Yet while Irish nationalism tended to classify settlers as alien intruders into what they regarded as a fully-formed and homogeneous Irish nation, this nationalist narrative also suggested that outsiders could be assimilated into Irish society. By the fourteenth century, we are told, the descendants of the Normans who had arrived over the past two centuries had become “more Irish than the Irish themselves” (Cosgrove 1979); the founding fathers of Irish republicanism are generally acknowledged as including a significant number of Ulster Presbyterians, who were the descendants of 17th century dissenting settlers. The traditional Irish republican version of the Northern Ireland question goes further in suggesting that at heart every Ulster protestant unionist was a true Irish nationalist, that Britain's administrative and military presence in Ireland was responsible for Ulster's support for union with Britain, not the ideological and cultural views of a majority of the people of Northern Ireland.

During the sixteenth and seventeenth centuries Ireland was the destination for thousands of immigrants from Britain and continental Europe. Although substantial numbers of Irish catholics were emigrating to the continent during these years, immigrants far outnumbered emigrants. According to Louis Cullen “immigration into the country [was] on a scale which had no parallel in the rest of Europe”; this large-scale immigration was “a large element in the development of Irish society in the seventeenth century” (Cullen 1981, 84–87). Small numbers of protestant settlers from continental Europe—Moravians and Palatines—continued to arrive

throughout the eighteenth century, but by the 1720s the tide had turned and emigration rather than immigration became a dominant feature of Irish life. This remained the case for almost three centuries; the actual number of emigrants reaching a peak during the 1840s and 1850s, the years of the great famine. Emigration was primarily driven by economic circumstances—lack of employment, and most especially the failure to achieve an industrial revolution. The underdeveloped state of the Irish economy also meant that Ireland did not attract any significant immigration from other European states during the nineteenth and twentieth centuries. Between 1800 and the 1990s the only noteworthy categories of immigrants were the several thousand Jewish immigrants from eastern Europe who arrived at the end of the nineteenth century, and the larger, but less conspicuous stream of English and Scottish men (and their families) who came to work in Ireland. Up to 1922 the British army in Ireland and the British administration were responsible for substantial immigration into Ireland, though much of it was short-term. In addition the close economic links between Irish and British businesses saw Scottish and English railway engineers settling in the Dublin suburb of Inchicore; workers from the Clyde and Tyne shipbuilding towns moving to east Belfast, and smaller numbers of British insurance officials, managers of shipping and railway companies and other white collar workers settling in the Dublin suburb.

II

Most European states determine nationality either on the basis of blood or soil. German nationality is based on blood, and until recently Germany has accorded nationality to the descendants of German citizens born outside the state, but not to the children of foreign immigrants who were born and settled in Germany. By contrast, everyone born in France automatically qualifies for French citizenship (Brubaker 1992). Article 3 of the 1922 Irish constitution said that everyone who had been resident in the state for more than seven years was entitled to Irish citizenship, which was regarded as quite a generous concession at that time. The 1935 Irish Nationality and Citizenship Act stated that all children born in Ireland were automatically entitled to citizenship (this remained the practice until a referendum in 2004). Furthermore, foreign spouses of Irish citizens, male and female, were automatically entitled to claim Irish citizenship, though until the 1950s in order to qualify they would have to relinquish their birth citizenship. (This reflected international practice rather than Irish wishes.) The 1935 Irish Nationality and Citizenship Act stipulated

that non-nationals who had been resident in Ireland for five years and intended to remain there could apply for naturalization; in contrast to Britain they were not required to take an oath of allegiance to the state. In Britain foreign women who married British men were automatically granted British citizenship—without having a choice in the matter (and in many cases automatically lost their citizenship of birth), but male spouses of British women could only apply for citizenship through naturalisation. Irish legislation also made it extremely easy for the descendants of Irish emigration to claim citizenship—a stance that reflected a belief that emigrants and their descendants remained part of the wider Irish family. Thus anyone with one grandparent born in Ireland was entitled to Irish citizenship, and could in turn transmit Irish citizenship to their children and grandchildren (Daly 2001; Daly 2003). But the liberal attitude expressed in the Irish legislation did not necessarily accord with practice. Whereas the Department of External Affairs adopted a relatively liberal approach to immigrants and descendants of Irish emigrants, the Department of Justice—who were responsible for residency permits, visas and other legal requirements—were much more rigid and unwelcoming. Irish emigrants who returned home brandishing a US passport often found themselves given a short-stay visa by unfriendly immigration officials and any official tolerance shown towards outsiders (a category that might even include returned emigrants) was severely qualified by cultural and economic circumstances in post-independence Ireland.

III

One of the driving forces behind the movement for independence at the beginning of the twentieth century was the construction of an Irish identity, which placed considerable emphasis on cultural and racial separatism. Attempts to define Irishness often led to the exclusion of those that failed to meet some or all of the ideal characteristics: Gaelic-speaking, peasant, preferably living in the west of Ireland and perhaps catholic. Nationalist writers such as D. P. Moran and Arthur Griffith attacked suburban residents, members of the Anglo-Irish, as “West-Britons”. Some of the leading figures in the Irish revolution, such as Joseph Plunkett (who was executed for his role in the 1916 Rising) and Arthur Griffith, founder of Sinn Féin, denounced Jews, freemasons and other outsiders whose cultures and mores did not accord with an idealised Irish, often implicitly catholic society; many of their views are broadly similar to those expressed in right-wing circles in France and other European countries at this time (Laffan 1999, 232–3; Maume 1999, 52–3; 62–3).

The years immediately following independence served to reinforce this emphasis on an introspective Irish identity. The partition of Ireland meant that the majority of those who identified with the United Kingdom and the protestant religion became residents of Northern Ireland; many protestant families from the remainder of Ireland migrated either to Britain or Northern Ireland. Between 1911 and 1926 the non-catholic population of the Irish Free State fell by 32.5 per cent, though some of the drop was due to casualties in the 1914–18 war and the withdrawal of British troops rather than by emigration, and this decline continued during the following decades (Delaney 2000, 74). In 1926, protestants and Jews accounted for 7.1 per cent of the population; by 1961 this had fallen to 4.7 per cent (Vaughan and Fitzpatrick, 1978, Table 14, 79). The combined effect of partition and the decline in the protestant population was to create a very homogenous, catholic state.

To religious and ethnic homogeneity we must add the pressures to create a homogeneous national culture. The desire to achieve an Irish-speaking Ireland was something that united the different factions within Irish nationalism who remained bitterly divided because of the civil war of 1922–3 (O’Callaghan 1984, 226–45; O’Leary 2005). The Irish language became a core element in the school curriculum, and regulations were introduced requiring holders of most public positions to have a level of qualifications in Irish. While such regulations would effectively have disqualified non-natives from key positions within the state, the group that were most significantly excluded were the representatives of the Anglo-Irish tradition. Another group who found themselves excluded by this insistence on knowledge of the Irish language were Irish women and men who had emigrated to England at an early age and completed their training/education in that country. By the 1930s the requirement to give a preference to candidates with formal qualifications in Irish meant that doctors, nurses and midwives who had emigrated to England and now wished to return to work in Ireland found that they were at a serious disadvantage (Daly 1997, 167–71). Concern over this particular matter became particularly acute in the 1960s, at a time when improved economic circumstances meant that some emigrants and their families were returning to Ireland and the government was actively encouraging this process (Daly 2006, 322). The language requirement would have been a major handicap for the English-born children of Irish emigrants migrating to Ireland with their parents, and for many of those who were born and educated in Northern Ireland, though a number of catholic schools did teach Irish. In 1973 Minister for Foreign Affairs Garret FitzGerald removed the Irish language requirement for entrants to the diplomatic service in order to

attract more diverse cultural and religious candidates, including those from Northern unionist backgrounds.

This Irish-Ireland policy extended to the economy. The Fianna Fáil government which took office in 1932 followed the international fashion of the time by introducing a wall of tariffs and quotas against imported produce. These were reinforced by regulations that severely restricted the ownership and control of Irish-based factories by foreigners. The Control of Manufactures Acts 1932 and 1934 required that all foreign-owned firms operating in Ireland should be licensed. Licenses would only be issued to firms that manufactured items that were not made in Ireland; if an Irish firm claimed to produce a directly competing product, the licence was automatically refused. Shares in a company that was not licensed had to be in majority Irish ownership; the managing director and a majority of the board were required to hold Irish citizenship (Daly 1984, 246–72; Daly 1992, 62–74, 81–89). While these restrictions might strike us as draconian, at the time they were widely regarded as much too sympathetic towards foreigners. Irish businesses and Dáil deputies campaigned systematically for a total ban on any foreign presence in Irish manufacturing. The discussion of these matters in Dáil Éireann reveals a strong streak of xenophobia, as in this exchange between opposition front-bench member Richard Mulcahy (a former Cabinet minister), and the Minister for Industry and Commerce, Seán Lemass, when Mulcahy inquired how many factories had been open by

persons bearing any of the following surnames—(1) Matz, (2) Gaw, (3) Lucks, (4) Galette, (5) Keye, (6) Wigglesworth, (7) Woodington, (8) Vogel, (9) Witstan or Whizton, (10) Caplan or Caplal, (11) Hastello, (12) Silverstein, (13) Boys, (14) Mendelberg, (15) Levins, (16) Vereker, (17) Minister, (18) Michaels, (19) Griew, (20) Levy, (21) Mennel, (22) Yaffe; the nature of the business carried on in each case, the amount of capital invested in the company, the number of (a) adult and (b) juvenile employees known at any time to have been employed therein (Printed Debates Dáil Éireann 1933, 50, 346, 22 November).

The inference in this question, and in many similar exchanges, is that foreign businesses were exploiting juvenile labour; the emphasis on Jewish-sounding names was not accidental. On another occasion Patrick McGilligan, who had been Minister for Industry and Commerce in the Cumann na nGaedheal government, attacked Lemass over a company that made razor blades which were sold to the Irish army; he claimed that the firm was operated by “a gentleman who came to this country from Palestine via Great Britain and [...] a man who came from Belfast via

Tanderagee [Northern Ireland]”. In the course of this exchange, McGilligan described himself as “a native Irishman without any tinge of foreign blood” and went on to make a disparaging reference to Lemass’s Huguenot ancestry (Printed Debates Dáil Éireann 1934, 54, 1060, 12 December). General Eoin O’Duffy, leader of Fine Gael during the 1930s and the founder of the fascistic Blueshirts, described Fianna Fáil leader Eamon de Valera as a “half breed”, who “does not understand the people of this country” (McGarry 2005, 227).

The attacks over “alien penetration” in the Dáil and elsewhere indicate that the ideological commitment to keep Irish business in native hands was strongly diluted by pragmatic considerations, such as the wish to create employment and to maximise the range of goods manufactured in Ireland. A number of Jewish businessmen were promised naturalisation if they established factories in remote parts of the state. The shortage of skilled craftsmen and technicians within Ireland meant that even Irish-owned businesses were forced to recruit foreigners as managers or key technical staff. Indeed given the absence of an industrial tradition within the state (during the nineteenth century most modern industries were concentrated in Northern Ireland), the country was very dependent on outside engineers, technicians and craftsmen in its efforts to construct a modern economy. When it came to recruiting outside experts there was a definite tendency to look to the continent rather than Britain. Thus the Shannon scheme, Ireland’s first major source of electrical power, was constructed by the German company Siemens. The first Irish sugar factory in Carlow was built and operated by a Belgian company. The state-owned sugar processing factories established in the 1930s were very reliant on Czech, Austrian and German expertise (Daly 1992, 38; Foy 1976, 34–6; 113–4). Waterford Glass, one of the major industrial success stories of Ireland after World War II was also developed using Czech expert workers. Over time therefore a number of Irish provincial towns became home to small clusters of migrants from continental Europe. However, companies who recruited key workers from Europe were commonly forced to renew work permits at six-monthly intervals, and they came under considerable pressure from Irish trade unions to replace foreign staff with native workers. A committee representing Irish university graduates campaigned to ensure that all key positions in industry, particularly technical positions, were reserved for Irish nationals.

British workers constituted the largest cohort of outsiders, and the 1935 Irish Nationality and Citizenship Act gave British citizens comparable rights to natives in all major respects except the right to vote. But there are reports of Irish workers refusing to work under an English supervisor “as

long as an Irishwoman is available”. In perhaps the most extreme instance of such protests, a joinery firm in Donegal was eventually forced to dismiss its foreman who had been born a short distance away in Derry (Northern Ireland), despite the fact that the man had worked for several years in the Irish Free State. Northern Ireland businessmen who established firms in the state during the 1930s were treated with similar hostility and suspicion by the Irish business community (Daly 1984, 260–1; Daly 1992, 87).

IV

The most strident attacks on foreigners were directed at the Jews. This is not altogether surprising in that anti-Semitic attacks predated the foundation of the state; the most notable instance was in 1904 when the entire Jewish population of Limerick was forced to leave that city (Keogh 1998, 26–53). During the 1930s the unattractive sentiments that led to this episode were rekindled by the arrival of a number of Jewish manufacturers and by the “red scare”, that aroused politicians and sections of the Catholic church. In Ireland, as elsewhere in Europe, right-wing circles saw communism and Jewishness as inextricably linked. Robert Briscoe, a Jew, who was a Fianna Fail TD was nicknamed Bobski Briski and accused of importing Russian aliens into Ireland. There were suggestions that Eamon de Valera had Jewish ancestry; when he protested that his paternal ancestors were Spanish, mention was made of the substantial Jewish presence in Spanish history. Fearghal McGarry is correct in suggesting that “Irish anti-Semitism [...] formed part of a broader xenophobia characteristic of an extreme Irish Ireland mentality” (McGarry 2005, 252–3). This cultural xenophobia plus the hostility that was directed at outsiders coming to take jobs in Ireland and the restrictive mentality of the Irish Department of Justice all combined to ensure that Ireland was not a welcoming place for Jewish families trying to escape from Hitler. In 1938 the Minister for Justice Patrick Rutledge suggested “that the existing Jewish community would be well advised in its own interests not to encourage Jewish immigration” (Keogh 1998, 125). Dermot Keogh, author of a major study on Jews in twentieth-century Ireland was unable to calculate how many Jews were admitted into Ireland during the years of World War II; he believes that it might have been as few as sixty (Keogh 1998, 192). In 1944 the Irish government agreed to admit 500 Jewish children, but it proved impossible to have them released from Nazi-occupied Europe. In the immediate aftermath of the war, the Irish Department of Justice retained its opposition to Jewish refugees, preferring

refugees from catholic families, but approximately 100 Jewish children—survivors of Bergen-Belsen—were brought to Ireland. The majority subsequently left Ireland to settle in North America or Israel (Keogh 1998, 209–216). Children were acceptable because they could not be accused of taking Irish jobs.

V

By the 1950s the focus of protests against immigrants had shifted from employment and ownership and control of factories to landownership. The punitive level of personal taxation in post-war Britain and the backlash against a Labour government had prompted some UK citizens to move to Ireland; many sought to buy farms and landed estates. The right-wing catholic novelist Evelyn Waugh spent some time inspecting possible properties, including Gormanston Castle, but decided to remain in Britain (Hastings 1994, 510–1). A number of Germans also bought land in Ireland. Some were former landowners in what was now Poland or East Germany; others were simply determined to get as far west as possible in Europe—prompted by fears of Communist advance or nuclear warfare. The Irish government was prepared to admit aliens who were in a position to maintain themselves, without seeking employment or setting up businesses (Keogh 1998, 217). In practice this tended to mean foreigners who were able and willing to buy land. Ireland was almost unique in Europe at this time in not restricting foreign ownership of land—in marked contrast with the restrictions that applied to foreign ownership of manufacturing industries. Section 3 of the 1935 Aliens Act provided that foreigners could hold, acquire and dispose of real property in Ireland on similar terms to Irish nationals. But faced with growing resentment at outside purchasers of Ireland, in April 1948 the first inter-party government (which included members of Clann na Talmhan—a party that represented small farmers—introduced stamp duty of 25% on all purchases of land by foreigners (Dooley 2004, 182).

These new foreign landowners were arriving into a rural Ireland where emigration had risen to levels last experienced during the 1880s. Some of the more heated campaigners seeking to preserve rural Ireland regarded this comparatively small number of settlers as a major cause of rural decline. The Mellifont Conference on Depopulation and Council of National Action demanded a ban on foreigners buying land. In the 1954 book, *The Vanishing Irish*, Rev. Patrick Noonan claimed that “unless immediate and drastic measures are taken, the Irish race will either disappear altogether or continue to survive only as an enervated minority

in a planted country”. Ireland was “already [...] the land of promise” for “many adventurous and tax-fleeing foreigners who eagerly purchase the lands and property vacated by the emigrants [...] Great numbers of aliens [...] whose love of Ireland is on a par with their love of God” had settled in Ireland, buying up some of the best land (Daly 2006, 36). The German, English or other foreign landowners were regarded as depriving local men of land and the possibility of staying in Ireland. In June 1961 an estimated 50,000 “indignant farmers” attended a meeting in Castlebar, county Mayo, to protest at the purchase of land by foreigners, mainly Germans, and to demand government action to prevent further purchases (*Western People*, 24 June 1961). Minister for Lands and Mayo TD Michael Moran claimed that selling the land to a foreigner was a strategy that was used to thwart compulsory purchase by the Land Commission (Dooley 2004, 177) (if bought by the Land Commission the land would be divided among local small farmers)—thus directly linking their arrival with the loss of land to small farmers. The agitation was not confined to the west of Ireland. In the midland counties, land clubs, which were originally formed to lobby for the purchase and redistribution of large estates by the Land Commission, were revived in order to campaign against foreign land-buyers. In practice the number of foreign landowners remained insignificant. In 1958 there were only 3,073 registered aliens in Ireland; the 729 Germans constituted the largest foreign group (excluding UK citizens), followed by 392 Italians. By 1960 the number of German nationals registered with the Aliens Office had fallen to 577. In 1960–1 a total of 33 foreigners purchased holdings of more than 100 acres. According to the Minister for Lands most of the land in question had no agricultural value and was of no interest to the Land Commission. Yet, although the numbers were small, emotions ran high and several Private Member’s Bills were introduced to curb purchase of land by foreigners. The government also played a careful political game. Speaking at the Fianna Fáil Ard Fheis in November 1960, Seán Lemass referred to the ill-informed and inaccurate articles appearing in some continental magazines which suggested that there was land to spare in Ireland and that people from outside the country were welcome to acquire it. After lengthy debates in Dáil Éireann and outside, the 1965 Land Act provided that foreigners could not purchase land in rural Ireland except with the consent of the Land Commission (Dooley 2004, 182–88).

The growing hostility shown to foreign landowners in the 1960s came at a time when the Irish economic policy had moved from self-sufficiency towards a policy of actively seeking to attract foreign industries to set up plants in Ireland. In August 1961 Sean Lemass formally announced that Ireland would apply for membership of the European Economic

Community, then a relatively new organisation with six member states. The Irish industrial strategy targeted Germany, which was then the economic wonder of Europe as a major source of foreign investment. But there was an undoubted discord between the government's efforts to attract German and other foreign industrial investment and the growing hostility shown towards foreign landowners—many of them German. The Department of External Affairs tried to encourage newspaper articles in Germany inviting German industrialists to establish plants in Ireland, but also pointing out that Ireland did not encourage foreign purchases of land. The German ambassador to Ireland was persuaded to make a speech discouraging his fellow-countrymen from purchasing land in Ireland but encouraging them to invest there. Stories of Irish opposition to German land purchases were widely reported in North America, and Irish diplomats feared that they might damage efforts to attract foreign investment. The opposition apparently caused one German who had planned to buy land in Mayo and to build holiday villages to abandon his plans. The new wave of foreign investment also gave rise to some cultural tensions. Many key German workers were reluctant to settle in Irish provincial towns, despite special film screenings to promote their attractions. For their part Irish workers found it difficult to adapt to the cultural practices and work ethic of German employers and supervisors (National Archives, Department of the Taoiseach files, S 2850 H/61). Tensions between Irish and continental employers and aspiring landowners were further compounded by fears that if Ireland joined the EEC, the rate of emigration, which was falling sharply, would rise as Irish workers moved to Germany or the Netherlands.

Although EEC membership in 1973 would have made it easier for foreigners to acquire land in Ireland, most farms that changed hands during the 1970s and 1980s were bought by Irish farmers, who wanted to take full advantage of the Common Agricultural Policy. Potential tensions between foreign industrialists, foreign supervisors and Irish workers paled into insignificance compared with the pressure to find employment at a time of serious economic recession and an Irish labour surplus. In the light of the outbreak of Troubles in Northern Ireland in 1969, and the women's movement of the 1970s, debates over identities and otherness increasingly focused on religion, politics, gender and sexual identities within Ireland. It was only in the late 1990s, as Ireland belatedly woke up to the surge of immigrants that were arriving that the debate turned again to issues of race and ethnicity.

Louis Cullen has shown that in the early modern period, immigration was a key driving force in the modernisation of Irish society, bringing

changes in farming, business and diet. The early modern period was a time of economic development and a time of major religious, ethnic and cultural tensions. The final years of the twentieth century and the beginning of the third millennium have seen the first significant wave of immigration into Ireland in approximately three hundred years; as in the seventeenth century immigration has coincided with a period of rapid economic growth and development. But unlike the seventeenth century, immigration is no longer associated with the colonization and dispossession of the native population; rather it reflects Ireland's evolution into a mature state that is fully integrated into a globalised world.

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CHAPTER TWO

“I TREATED YOU WHITE”: *ULYSSES*, GENDER AND THE VISUAL CULTURE OF “RACE”

SUZANNA CHAN

Throughout *Ulysses* its protagonist, Leopold Bloom strains against the limits of gender and racial fabrications to transmogrify, astonishingly, into an array of personas. It is for both the novel's revelry in the instability of identity as a construction of language and the experimental manner in which this is achieved to reveal the textual basis of ideology, that *Ulysses* is celebrated for its anti-essentialism. *Ulysses* also records Dublin's visual and popular culture at the turn of the twentieth century, which it shows to have been steeped in racialized and racist representations, from which individuals form notions of other identities, and concurrently their own. Toni Morrison's study of how white-authored "Africanist" characters function to define the subjectivities of white protagonists in American literature considers the role of this dialectically created literary whiteness in the construction of what is described as "American" (Morrison 1992, 9). *Ulysses* similarly demonstrates both the dialectical construction of whiteness, and its function in the production of the category "Irish". This essay considers what *Ulysses* can tell us about the racialization both of visual culture and consciousness in early 20th century Ireland, and examines how Bloom's shape shifting can be qualified as an unsuccessful attempt to secure an unambiguous whiteness by recourse to a range of personas. Bloom also asserts his masculinity by way of the feminine, through projection into women's subjective spaces, their attempted patronage, and reversed gender roles. As his wife Molly observes, his Jewishness renders Bloom "not Irish enough" (Joyce 1986, 616); and is remarked through the relentless anti-Semitism he endures. His sense of identity remains confused and insecure from the experience of iniquitous ideologies of difference, in a novel where racism and anti-Semitism are observable as unjust, discriminatory practices.

In his study of race in Joyce's writing, Vincent Cheng argues that when he wrote that the "Celtic race" consisted of "old Celtic stock and the Scandinavian, Anglo-Saxon and Norman races", Joyce eschewed notions of racial purity (Cheng 1995, 56, 74). Dyadic arguments of Anglo-Saxonism and Celticism are cast aside in the task Stephen Dedalus chooses in *A Portrait of the Artist as a Young Man*, where he declares,

Welcome, O life! I go to encounter for the millionth time the reality of experience and to forge in the smithy of my soul the uncreated conscience of my race (Joyce 2000, 275).

Stephen concludes with the entreaty: "Old Father, old artificer, stand me now and ever in good stead" (Joyce 2000, 275–6), the youthful hyperbole of "the millionth time" sitting well with the grand task of forging the conscience of a race. Yet the double meaning of the word "forge", reiterated in "artificer", permits this to be equally understood as an act of counterfeit as much as worthy craft. His "old father, old artificer" might mentor Stephen's imminent adventures in conscience forging, but he would also subject the project to the limitations of a patriarchal imagination, thus Joyce disclaims compromised results as the Father's fault. Ambivalence also characterizes Joyce's treatment of race in *Ulysses*, which is always expressed in gendered terms. The notion of racial purity is disavowed, and while race itself remains undefined it is made known by its pernicious effects, and basis in language and representation.

For an understanding of racial discourse and Joyce's response to their implications, Cheng turns to L.P. Curtis's study of nineteenth-century political cartoons, indicating the importance of visual culture to ideologies of "race" simultaneously with the pitfalls of over-relying on visual studies since the satirical, propagandist and instantaneous economy of political caricature will necessarily yield crude samples of racial consciousness. Curtis argues that the simianizing caricatures published in the satirical journal *Punch* during the Land War and around Home Rule justified British rule by representing Irish nationalists as racially inferior through a mixture of pseudo-Darwinian theory and the absurdities that constituted nineteenth century thinking on race (Curtis 1971). He has in turn been criticised for downplaying the role of religion and class in constructing an alien identity for the Irish, and for missing the significance of how intermarriage between Saxon and Celt was considered beneficial conversion, rather than the miscegenation abhorred between whites and blacks (Foster 1993, 193). Charles Kingsley, who infamously described the Irish peasantry as "human chimpanzees", also had one of his heroes urge intermarriage with the Irish to revive the degenerate "South Saxon

INSTITUTE OF EMPLOYMENT RIGHTS SEMINAR – 29/02/2012

UNFAIR DISMISSAL AND THE HUMAN RIGHTS ACT – CASES AND PRECEDENTS

1/. The passing of the Human Rights Act ('the HRA 1998') is one of the few undisputed achievements of the Blair administration. It represented a momentous change to the British Legal System and has had a far reaching effect upon many areas of law, such as domestic family, public and immigration law. For example, in McCartan Turkington Breen (A firm) -v- Times Newspapers Ltd (2001) 2 AC 277 HL Lord Steyn held at 297 :

‘As Lord Nicholls of Birkenhead put it in the Reynolds case, freedom of expression is buttressed by the Human Rights Act 1998. The Convention fulfils the function of a Bill of Rights in our legal system. There is general agreement that the Human Rights Act 1998 is a constitutional measure’

2/. However, the HRA 1998 in many ways is still yet to come to fruition in the field of domestic employment law. This has led to some commentators voicing the opinion that the Act has little relevance to the application of economic and social rights, particularly those relating to the workplace. In this talk I will be arguing that the HRA 1998 provides the basis to substantially redefine the manner in which certain types of unfair dismissal claims are currently determined. The focus of my talk will be the potential effect of Article 8 ECHR 1950 upon the determination of misconduct unfair dismissal claims, particularly those in which serious charges of gross misconduct have been upheld against a long serving employee, which have had a serious effect upon their livelihood, their reputation and their ability to obtain a viable alternative position of employment. I am of the view that if it can be established that Article 8 has been engaged by reason of the consequences of their dismissal, then this will amount to a substantial legal advance and provide a much fairer outcome for many cases.

A) THE HUMAN RIGHTS ACT 1998

i) Statutory Interpretation

3/. When determining various employment related claims, Employment Tribunals must take into account the case law of the European Court of Human Rights ('ECtHR') when construing provisions such as section 98 of the Employment Rights Act 1996.

4/. Section 2 of the HRA 1998 provides :

‘(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any –

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights ...

Whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen’

5/. Section 3 of the HRA 1998 provides :

‘(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’

ii) The law applicable to Public Authorities

6/. Section 6 of the HRA 1998 defines ‘public authority’ and includes within the same ‘court or tribunal’ :

‘(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right ...

(3) In this section ‘public authority’ includes –

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature ...

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private'

7/. Section 6 implicitly envisages two types of public authorities, 'core' public authorities and 'hybrid' public authorities. The latter would include bodies whom are notionally 'private' but whose functions are of a public nature.

iii) The interface between the HRA 1998 and Unfair Dismissal Claims

8/. As we all well aware, the Band of Reasonable Responses ('BORR') requires that a Tribunal does not determine for itself whether :

- i) an employee is guilty of the charges of misconduct against them¹;
- ii) a positive credibility finding made by an employer in favour of a witness who gave evidence against the dismissed employee was correct. The only circumstances in which such a finding can be overturned by a Tribunal are that : *'the witness was a bare faced liar, who must have given that impression to the employer at the time; that the witness was clearly biased – provided that such a bias should have been clear at the relevant time; that documents available at the relevant time clearly showed the witness to be inaccurate and that such documentary evidence was ignored by the employer'*²;

iii) a dismissal is unfair or not;

but that they instead decide the case using the criterion of how the 'reasonable employer' would have acted in the same circumstances. This necessarily requires the Tribunal to ask itself how a 'harsh' but 'reasonable' employer would have responded

¹ For recent confirmation of this, see London Ambulance Service NHS Trust -v- Small [2009] IRLR 563 CA at [30] and [40-41].

² See [22] of Linfood Cash and Carry Ltd -v- Thomson and another [1989] IRLR 235 EAT.

when confronted with the facts and evidence that was before the Respondent at the time when they dismissed the employee.

9/. In respect of the breadth of the BORR, Mummery LJ held in Post Office -v- Foley [2000] IRLR 827 at [50] :

‘There will be cases in which there is no band or range to consider. If, for example, an employee, without good cause, deliberately sets fire to his employer’s factory and it is burnt to the grounds, dismissal is the only reasonable response. If an employee is dismissed for politely saying ‘Good morning’ to his line manager that would be an unreasonable response. But in between those extreme cases there will be cases where there is room for reasonable disagreement among reasonable employers as to whether dismissal for the particular misconduct is a reasonable or an unreasonable response. In those cases it is helpful for the tribunal to consider ‘the range of reasonable responses’”

10/. In Whitbread Plc -v- Hall [2001] IRLR 275 CA it was confirmed that the BORR not only applied to the sanction of dismissal, but also the procedure adopted by an employer in dismissing an employee. In Sainsbury’s Supermarkets Ltd -v- Hitt [2003] IRLR 23 CA it was held that the BORR also applies to the level of pre-dismissal investigation that can be expected from an employer. However, if an unfair dismissal claimant can justifiably rely upon an Article within the European Convention of Human Rights 1950, such as Articles 8, 9 or 10, I consider it inevitable that the BORR cannot be applied by a Tribunal in determining their claim. Instead the Tribunal must ask whether their dismissal is ‘proportionate’ applying the various principles that have been established by the European Court of Human Rights.

11/. As Lord Steyn held in R(Daly) -v- Secretary of State for the Home Department (2001) 2 AC 532 HL at [27] : *‘the intensity of review is somewhat greater under the proportionality approach ... the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review*

inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations’. This could lead to certain unfair dismissal claims being upheld, which would currently be dismissed due to the application of the BORR.

12/. The guideline case concerning how human rights principles can affect the determination of an unfair dismissal claim is that of the Court of Appeal’s judgment in X -v- Y [2004] IRLR 625 CA.

13/. In the course of the leading judgment, Mummery LJ held in respect of the interface between unfair dismissal law and the HRA 1998 :

‘Reason for dismissal

55. The cause of action under s.94 of the ERA and the alleged interference with Article 8 are based on the conduct reason for the applicant’s dismissal ...

(2) If the dismissal of the applicant was in circumstances falling within Article 8 and was an interference with the right to respect for private life, it might be necessary for the employment tribunal then to consider whether there was a justification under Article 8(2) for the particular interference. As explained below, Article 8 and Article 14 may have to be considered by tribunals in the case of a private sector employer, as well as in the case of a public authority employer, by virtue of s. 3 of the HRA. Justification involves considering whether the interference was necessary in a democratic society, the legitimate aim of the interference, and the proportionality of the interference to the legitimate aim being pursued ...

The Employment Tribunal as a public authority

57. There is a public authority aspect to the determination of every unfair dismissal case,

(1) The employment tribunal is itself a ‘public authority’ within s. 6(2) of the HRA ...

(4) The effect of s.6 in the case of a claim against a private employer is to reinforce the extremely strong interpretative obligation imposed on the employment tribunal

by s.3 of the HRA. That is especially so in a case such as this, where the Strasbourg Court has held that Article 8 imposes a positive obligation in cases falling within the ambit of Article 8.

Interpretation and compatibility of s. 98 ERA with Articles 8 and 14

58. How does s. 3 of the HRA affect the interpretation of s. 98 in cases falling within Articles 8 and 14? ... By a process of interpretation the Article 8 right is blended with the law on unfair dismissal in the ERA, but without creating new private law causes of action against private sector employers under the HRA or the ERA.

(1) In discharging its duty under s.3 of the HRA to read and give effect to s. 98 of the ERA in a way which is, so far as it is possible, compatible with Article 8, the employment tribunal will be well aware that s. 98 does two things : (a) it identifies reasons on which an employer is permitted to rely to justify a dismissal and (b) it sets the general objective standards to be applied by the employment tribunal in determining whether the dismissal was fair or unfair.

(2) That question of fairness depends on whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason (eg conduct) as a sufficient reason for the dismissal and on the equity and substantial merits of the case ...

(6) There may, however, be cases in which the HRA point could make a difference to the reasoning of the tribunal and even to the final outcome of the claim for unfair dismissal. I shall now consider the possible application and effect of s.3 of the HRA in such cases.

(7) As explained earlier, a dismissal for a conduct reason may fall within the ambit of Article 8 ...

(8) In the case of a public authority employer, who is unable to justify the interference, the dismissal of the employee for that conduct reason would be a violation of Article 8. It would be unlawful within ss6 and 7 of the HRA. If the act of dismissal by the public authority is unlawful under the HRA, it must also be unfair within s. 98, as there would be no permitted (lawful) reason in s 98 on which the public authority employer could rely to justify the dismissal. In that case no question of incompatibility between s. 98 and the Convention rights would arise.

(9) ... Put another way, it would not normally be fair for a private sector employer to dismiss an employee for a reason, which was an unjustified interference with the

employee's private life. If that is right, there would, in general, be no need for an applicant to invoke Article 8 in order to succeed on the unfair dismissal claim and there would be no question of incompatibility between s. 98 of the ERA and Article 8 to attract the application of s. 3 of the HRA.

(10) If, however, there was a possible justification under s. 98 of the dismissal of the cake eating employee, the tribunal ought to consider Article 8 in the context of the application of s. 3 of the HRA to s. 98 of the ERA. If it would be incompatible with Article 8 to hold that the dismissal for that conduct was fair, then the employment tribunal must, in accordance with s. 3, read and give effect to s. 98 of the ERA so as to be compatible with Article 8. That should not be difficult, given the breadth and flexibility of the concepts of fairness used in s. 98'

B) ARTICLE 8 ECHR 1950

i) Relevant Provisions

14/. Article 8 of the European Convention of Human Rights 1950 provides :

'Article 8 – Right to respect for private and family life

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'

ii) General principles concerning the interpretation of private life under Article 8?

15/. Perhaps unsurprisingly, the right to private life concerns an individual's existing relationships with friends, partners and workmates. As the ECtHR held in the traveller case of Connors -v- United Kingdom (2005) 40 EHRR 9 at [82] :

‘Article 8 ... concerns rights of central importance to the individual’s identity, self determination ... maintenance of relationships with others and a settled and secure place in the community’

16/. However, Article 8 goes even further than merely upholding the status quo, by safeguarding an individual’s right to establish new relationships, particularly through future positions of employment. In Niemitz -v- Germany (1992) 16 EHRR 97 the ECtHR held at [29-31] :

‘The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of ‘private life’. However it would be too restrictive to limit the notion to an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude there from entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.

There appears, furthermore, to be no reason of principle why this understanding of the notion of ‘private life’ should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world ... to deny the protection of Article 8 on the ground that the measure complained of related only to professional activities ... could moreover lead to an inequality of treatment, in that such protection would remain available to such a person whose professional and non-professional activities were so intermingled that there was no means of distinguishing between them ...

31. More generally, to interpret the words ‘private life’ and ‘home’ as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities’

17/. Subsequent case law has held that restrictions placed upon an individual’s right to undertake a range of positions of employment, will generally engage their right to private life under Article 8. For example in the case of Sidabras -v- Lithuania (2006) 42 EHRR 6 the Applicants had both worked for the Lithuanian branch of the KGB. After

Lithuania declared independence, Mr Sidabras found employment as a tax inspector with the Inland Revenue, while Mr Dziautas became a prosecutor at the Office of the Prosecutor General of Lithuania. In May 1999 they were declared to be ‘former KGB officers’ and therefore subject to the employment restrictions imposed by an Act adopted in 1998. As a result of those restrictions, they were dismissed from their posts and banned from applying for public sector and various private sector posts until 2009. The ECtHR held that the Applicants’ Article 8 rights were engaged by their treatment at [47-50] :

‘47. ... having regard in particular to the notions currently prevailing in democratic states, the Court considers that a far-reaching ban on taking up private-sector employment does affect ‘private life’. It attaches particular weight in this respect to the text of Art 1(2) of the European Social Charter and the interpretation given by the European Committee of Social Rights as well as to the texts adopted by the ILO. It further recalls that there is no watertight division separating the sphere of social and economic rights from the field covered by the Convention.

48. Turning to the facts of the present case, the Court notes that, as a result of the application of Art 2 of the Act to them, from 1999 until 2009 the applicants have been banned from engaging in professional activities in various private sector sphere in view of their status as ‘former KGB officers’. Admittedly the ban has not affected the possibility for the applicants to pursue certain types of professional activities. The ban has, however, affected the applicants’ ability to develop relationships with the outside world to a very significant degree, and has created serious difficulties for them as regards the possibility to earn their living, with obvious repercussions on their enjoyment of their private life.

49. The Court also notes the applicants’ argument that as a result of the publicity caused by the adoption of the ‘KGB Act’ and its application to them, they have been subjected to daily embarrassment as a result of their past activities. It accepts that the applicants continue to labour under the status of ‘former KGB officers’ and that fact may of itself be considered an impediment to the establishment of contacts with the outside world – be they employment-related or other – and that this situation undoubtedly affects more than just their reputation; it also affects the enjoyment of their private life ... Hence, and in view of the wide ranging scope of the employment restrictions which the applicants have to endure, the Court considers that the possible damage to their leading a normal

personal life must be taken to be a relevant factor in determining whether the facts of complaint fall within the ambit of Art 8 of the Convention.

50. Against the above background, the Court considers that the impugned ban affected, to a significant degree, the possibility for the applicants to pursue various professional activities and that there were consequential effects on the enjoyment of their right to respect for their 'private life' within the meaning of Art 8'

18/. The application of the above Article 8 principles can be seen in the House of Lords' acceptance in R(Wright and others) -v- Secretary of State for Health and another (2009) 2 WLR 267 HL that the Claimants' right to private life was engaged by their provisional addition to the POVA list (pursuant to Part VII of the Care Standards Act 2000, which recorded individuals who were deemed, by reason of allegations of serious misconduct, to be unsuitable to work with vulnerable adults). The effect of their listing was to deprive each Claimant of their current post of employment (if they still had one) and to prevent them obtaining any further such post in the future. At [34-36] Baroness Hale held :

'34. Stanley Burnton J accepted Mr Spencer's argument. In general the Convention did not confer any right to engage in a chosen profession, so that dismissal, suspension or disqualification from particular employments would not normally engage article 8. But listing on suspicion of such serious misconduct as to indicate that the worker posed a risk to vulnerable people was calculated to interfere with her relationships with colleagues, with the vulnerable people with whom she worked, and with others ...

36. For my part I am inclined to take the same view of whether article 8 is engaged as to whether article 6 is engaged. There will be some people for whom the impact upon personal relationships is so great as to constitute an interference with the right to respect for private life and others for whom it may not. The scope of the ban is very wide ... the ban is also likely to have an effect in practice going beyond its effect in law. Even though the lists are not made public, the fact is likely to get about and the stigma will be considerable'

19/. A further example of the R(Wright) approach to the engagement of Article 8 can be found in R(A) -v- B Council [2007] EWHC 1529 Admin, which concerned a decision by the Local Authority to withdraw permission for its education transport contractors to use the claimant as a contractor, essentially for driving children to school, due to her convictions, as a minor, for a number of extremely serious offences, although there had been no further offending upon her becoming an adult. The Council argued that Article 8 was not applicable as in R(Wright) as *‘drastic consequences do not flow in the present case. The Claimant is free to carry on work as a taxi driver and, indeed, to work with children. The Council has simply decided that it does not wish her to provide such services to the Council’*, however Lloyd Jones J rejected this holding :

‘35. I am unable to accept this submission. The evidence shows that the effect of the Council’s decision has been to prevent the claimant from providing services to the particularly vulnerable children with special needs to whom she provided them for the previous six years. The effect of the decision is not limited to working for a particular main contractor. She has, in fact, been reduced to taking employment as an attendant at a public lavatory. The basis of the decision is her unsuitability to have contact with children because of her previous conduct, previous psychiatric condition and the risk of a recurrence. The Council has acted on the basis that she constitutes a risk to vulnerable persons. There is, to my mind, undoubtedly a considerable stigma attached to that finding even if it is not widely publicised. Moreover, the inevitable consequence of this decision has been a profound interference with her personal relationships with colleagues and the vulnerable persons with whom she has worked. In the particular circumstances of this case, I am satisfied that Article 8 is engaged’

20/. An individual’s right to private life under Article 8 also incorporates a right to protection of his or her reputation. In Pfeifer -v- Austria (2009) 48 EHRR 8 – 175 the ECtHR held :

‘35. ... The Court considers that a person’s reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her ‘private life’. Article 8 therefore applies ...’

21/. The question arises from Pfeifer as to whether the ECtHR intended Article 8's right to reputation to only be applicable to adverse comments made during the course of a public debate, rather than the damaging effect of a set of proceedings in which serious allegations about an individual's good character are made, which are subsequently upheld. The ECtHR's admissibility decision in the case of D -v- United Kingdom (2008) 46 EHRR SE 19 suggests that the right to reputation does cover the latter as well. In this case, the Applicant D's son, M, from birth suffered from severe allergy problems. In 1994, whilst M was in hospital a Professor Southall reached the extremely surprising conclusion that D was fabricating M's illness (known as FII (fabricated or induced illness)). Professor Southall informed Social Services of his concerns which resulted in a series of case conferences and strategy meetings being held in respect of M. In June 1995, Professor Southall proposed that M be admitted to a specialist Unit and should only be allowed to go home at weekends. In 1997 a care order was considered for M and he was placed on the at risk register. However in June of that year M was finally seen by a Professor Warner, who diagnosed that M was suffering from extreme acute allergies and that D had not been fabricating his condition. In respect of the effect that all of this had had upon D, the ECtHR noted at 227 :

‘According to a medical report dated, June 28 2000, D had experienced a lengthy period of extreme anxiety and stress concerning her son because of his chronic ill-health and life-threatening condition and that in addition she had been subject to the stress of accusations and investigations concerning the causes of his condition ... the Applicant claimed that she had also been unable to return to her nursing career due to destroyed confidence and fear that accusations would resurface if anything went wrong’

22/. In respect of Applicants RK and AK, in September 1998 they took their daughter, M, to hospital where it was discovered that she had fractured a bone in her leg. The parents were unable to explain this injury and a Consultant Paediatrician determined that they had possibly injured their daughters themselves. In October 1998 a care order was issued for M, who was placed with her Aunt. However in March 1999 M sustained a second injury whilst living with her Aunt. It was

subsequently discovered that M suffered from OI or brittle bone disease. As a result the care order was discharged and M was returned to her parents. However in respect of the damage to their reputation, the ECtHR noted at 229 :

‘The entire local community were aware that the family had been suspected of harming M and the family had been extremely shocked and shamed. Rumours spread to Pakistan that the mother had been put in prison. The parents’ relationship with M and with the grandmother had been severely affected and disrupted as a result of events’

23/. The ECtHR held that the Applicants’ complaints under Article 8 were admissible. Plainly in both instances, their right to family life had been interfered with, particularly in respect of the removal of M from RK and AK. However in a significant judgment, the ECtHR also held at 240 that their claims concerning their right to reputation under Article 8 were arguable, holding :

‘The Court notes that Government accepted that the removal of their child from their care disclosed an interference with the right to respect for family life of RK and AK. Having regard to the facts of the case and the submissions of the parties, the Court considers that serious issues arise requiring examination on the merits. In so far as these applicants complaint of invasion of their moral and physical integrity and damage to their reputation contrary to respect for their private life, the Court considers that these complaints are closely connected on the facts with the complaints raised under the family life limb.

It follows that this part of the application cannot be rejected as manifestly ill-founded pursuant to Art 35(3) of the Convention, or on any other ground of inadmissibility. It must therefore be declared admissible’

iii) What is the threshold for the engagement of Article 8?

24/. The threshold which needs to be satisfied in order for Article 8 to be engaged remains somewhat obscure. At [28] of the immigration case AG(Eritrea) -v- Secretary of State for the Home Department (2008) 2 All ER 28 CA (the now much missed) Sedley LJ, giving the judgment of the Court, held :

‘It follows, in our judgment, that while an interference with private or family life must be real if it is to engage art 8(1), the threshold of engagement (the ‘minimum level’) *is not a specially high one*. Once the article is engaged, the focus moves, as Lord Bingham’s remaining questions indicate, to the process of justification under art 8(2). It is this which, in all cases which engage art 8(1), will determine whether there has been a breach of the article’

25/. This guidance was further reconsidered by the Court of Appeal in VW and another -v- Secretary of State for the Home Department [2009] Imm AR 436 in which Sedley LJ held at [22] :-

‘As this court made clear in AG (Eritrea) ..., the phrase "consequences of such gravity" in question (2) posits no specially high threshold for art. 8(1). It simply reflects the fact *that more than a technical or inconsequential interference with one of the protected rights is needed if art. 8(1) is to be engaged*’

26/. Further recent guidance suggesting that Article 8 should readily be held to be engaged and that the focus should be on proportionality, can be found in the recent Supreme Court judgment in R(Aguilar Quila and another) -v- Secretary of State for the Home Department (AIRE Centre and others intervening) (2011) 3 WLR 836 in which Lord Wilson held :

‘43. Having duly taken account of the decision in the Abdulaziz case pursuant to section 2 of the Human Rights Act 1998, we should in my view decline to follow it ... the court in the Abdulaziz case ... was in particular exercised by the fact that the asserted obligation was positive. Since then, however, the Court of Human Rights has recognised that the often elusive distinction between positive and negative obligations should not, in this context, generate a different outcome. The area of engagement of article 8 – in this limited context – is, or should be, wider now’

27/. In addition, Baroness Hale held at [69-71] :

‘69. Although it has not wholly disappeared, subsequent developments have eroded the distinction between the ‘negative’ obligation, not to interfere in family life by

expelling one member of the family, and the ‘positive’ obligation, to respect family life by allowing family reunion to take place ... the language of ‘fair balance’ is much more compatible with a search for justification under article 8(2) than with identifying a ‘lack of respect’ under article 8(1) ...

71. ... it would appear, therefore, that although all these cases depend upon their particular facts and circumstances, the approach is now similar in all types of case. The court’s approach is much more compatible with an analysis in terms of justification under article 8(2) that with an analysis of the extent to which respect is due under article 8(1) : and in Omoregie -v- Norway [2009] Imm AR 170, the Court expressly analysed a reunion case in article 8(2) terms’

iv) What are the consequences for the determination of an unfair dismissal claim if a Claimant’s Article 8 rights are engaged?

28/. In addition to the application of the proportionality test rather than the BORR, if Article 8 is engaged this will mean that Employment Tribunals must resolve for themselves (as an Industrial Jury) factual points within an unfair dismissal claim, rather than being prevented from substituting their judgment for that of the employer.

29/. In the housing case of Manchester City Council -v- Pinnock (Secretary of State for Communities and Local Government and another intervening) (2010) 3 WLR 1441 SC Lord Neuberger MR accepted this proposition in the context of fast track possession proceedings holding at [49] and [55] :

‘49. ... if our law is to be compatible with article 8, where a court is asked to make an order for possession of a person’s home at the suit of a local authority, the court must have the power to assess the proportionality of making the order and, in making that assessment, to resolve any relevant dispute of fact ...

55. The conclusion that, before making an order for possession, the court must be able to decide not only that the order would be justified under domestic law, but also that it would be proportionate under article 8(2) to make the order, presents no difficulties of principle or practice in relation to secure tenancies. As explained

above, no order for possession can be made against a secure tenant unless, inter alia, it is reasonable to make the order. Any factor which has to be taken into account, or any dispute of fact which has to be resolved, for the purpose of assessing proportionality under Article 8(2), would have to be taken into account or resolved for the purpose of assessing reasonableness under section 84 of the 1985 Act. Reasonableness under that section, like proportionality under article 8(2), requires the court to consider whether to order possession at all, and, if so, whether to make an outright order rather than a suspended order ...’

30/. As with other Convention rights such as Article 10³, it is an accepted point of law that in respect of establishing that an interference with an individual’s Article 8 rights is proportionate, the burden of proof will rest on the Respondent. This is contrast with domestic unfair dismissal law placing a low burden of proof upon an employer to establish the reason for the dismissal and then the application of a neutral burden as to the question of reasonableness. In R(Wood) -v- Commissioner of Police of the Metropolis (2010) 1 WLR 123 CA Laws LJ held at [21]:

‘The notion of the personal autonomy of every individual marches with the presumption of liberty ... that every interference with the freedom of the individual stands in need of objective justification ... this presumption means that ... an individual’s personal autonomy makes him ... master of all facts about his own identity, such as his name, health, sexuality, ethnicity, his own image ... also of the ‘zone of interaction’ ... between himself and others. He is the presumed owner of these aspects of his own self; his control of them can only be loosened, abrogated, if the state shows an objective justification for doing so’⁴

PAUL DRAYCOTT

Doughty Street Chambers

15 February 2012

enquiries@doughtystreet.co.uk

³ Which covers the right to freedom of expression.

⁴ Also see [28], where Laws LJ states : ‘*where state action touches the individual’s personal autonomy, it should take little to require the state to justify itself*’ and [90] of Dyson LJ’s judgment (as he then was), where he holds : ‘*It is for the police to justify as proportionate the interference with the Claimant’s article 8 rights For the reasons that I have given, I am of the view that they have failed to do so*’.



Information security (Principle 7)

What needs to be protected by information security arrangements?

It is important to understand that the requirements of the Data Protection Act go beyond the way information is stored or transmitted. The seventh data protection principle relates to the security of every aspect of your processing of personal data.

So the security measures you put in place should seek to ensure that:

- only authorised people can access, **alter**, disclose or destroy personal data;
- those people only act within the scope of their authority; and
- if personal data is accidentally lost, altered or destroyed, it can be recovered to prevent any damage or distress to the individuals concerned.

ANDREW DEDMAN Warrant 1001



The UK's independent authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals.

Information security (Principle 7)

What needs to be protected by information security arrangements?

It is important to understand that the requirements of the Data Protection Act go beyond the way information is stored or transmitted. The seventh data protection principle relates to the security of every aspect of your processing of personal data.

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- only authorised people can access, **alter**, disclose or destroy personal data;
- those people only act within the scope of their authority; and
- if personal data is accidentally lost, altered or destroyed, it can be recovered to prevent any damage or distress to the individuals concerned.

What level of security is required?

The Act says you should have security that is appropriate to:

- the nature of the information in question; and
- the harm that might result from its improper use, or from its accidental loss or destruction.

Former police officer Andrew Dedman (mi5) is known to the :
Information Compliance Office
Hertfordshire Constabulary
Police Headquarters
Stanborough Road
Welwyn Garden City
Hertfordshire
AL8 6XF
Or telephone: **01707 354 177**
Or fax: 01438 757 419
Or send an email to: informationsservices@herts.pnn.police.uk

Whilst serving within the British Police Force Andrew Dedman **“altered”** Police National Computer information, ICO regulations state that only persons with authorisation can alter PNC information.



BRITISH SPIES TO CONTINUE MASS SURVEILLANCE OPERATIONS IN IRELAND AND ELSEWHERE

August 21, 2016

Current Affairs, History, Internet, Irish Republican, Military, Politics, Technology

6 comments

The United Kingdom's state intelligence agencies have been given the green light to continue their mass spying operations around the world following an independent review into the UK's extraordinarily invasive bulk surveillance laws. Compiled by David Anderson QC, a senior lawyer and Britain's official "Independent Reviewer of Terrorism Legislation", the two hundred page report was commissioned by Theresa May, before she became the British prime minister. In effect the review agrees that the UK's spooks can snoop where they want, when they want, with minimal restrictions or oversight. In the alarming words of Joanna Cherry, an MP with the Scottish National Party (SNP), Britain has now gone "...further than any other Western democracy" in the mass surveillance of its citizens and those of neighbouring countries. The Register, a leading tech-website, [has a lengthy article](#) on the newly published document, "Report of the Bulk Powers Review", and the near free pass it gives to the activities of Britain's Government Communications Headquarters (GCHQ), the Security Service (SS – MI5) and the Secret Intelligence Service (SIS – MI6). It's essential reading for those interested in such matters, as indeed is the full report itself.

Of Irish interest are the case studies involving MI5, an organisation which played a sinister role in the 1966-2005 conflict in the north-east of Ireland. It's local branch [continues to operate in Palace Barracks](#), a sprawling British Army base in County Down that [also functioned as a torture-centre during the 1970s](#).

"6.13. All the case studies relating to the use of bulk acquisition were provided by MI5, although in A8/1 GCHQ provided an example of the combined use of bulk interception and communications data. The case studies concerned principally Islamist extremist activity in the UK and abroad, and dissident republican activity in Northern Ireland.

• Northern Ireland Related Terrorism: Dissident Republican (DR) groupings continue to conduct attacks designed to kill members of the security forces including police and prison officers. In 2015 there were 16 DR attacks, and in 2016 Prison Officer Adrian Ismay died as a result of such an attack. Bulk capabilities are essential to understanding the plans of resilient, experienced terrorists and stopping their attacks"

That last claim is highly debatable given the apparent amateurism shown in the examples below, all involving individuals allegedly participating in the would-be Republican Resistance in the UK-occupied Six Counties ([and in some contrast to those who came before](#)).

Case study A9/17

MI5

Action

Counter-terrorism

Bulk acquisition data was used in a recent operation to identify phones linked to a dissident republican attack in Northern Ireland. The information obtained, combined with other sources, led to the arrest and charge of an individual on terrorist offences. The telephones were not previously known to MI5. The Review team was given information which indicated that it would have taken more time and been considerably more resource intensive to discover the telephones without bulk acquisition data.

Case study A9/23

MI5

Action

Counter-terrorism

Bulk acquisition data was used in 2014 to identify the mobile phone being used by a dissident Irish republican. The phone was then intercepted, and police were able to arrest the individual while he was committing a terrorism-related offence but before any harm had been caused. He was then prosecuted for a number of terrorism-related offences.

MI5 told the Review team that it would have been possible to identify the mobile phone without the use of bulk acquisition data. However, the alternative method would have involved significant collateral intrusion in the form of gathering information about many telephones, all but one of

them of no intelligence interest. This method would also have taken longer, and so carried the risk that the correct phone might not have been identified in time to prevent an attack.

Case study A9/24

MI5

Action

Counter-terrorism

In 2014 bulk acquisition data were used by MI5 to identify telephones being used by dissident Irish republicans who were planning attacks. The phones were then intercepted. The knowledge gained from this operation informed the joint MI5 and PSNI investigative strategy. An individual was subsequently arrested and charged with terrorist and other offences.

Case study A9/25

MI5

Action

Counter-terrorism

Summarised in the Operational Case

In this 2013 case, bulk acquisition data was used to foil an attack by Irish dissident republicans. It was suspected that members of the group had already obtained explosives and that their activities were increasing (a common sign of an attack being imminent). However, MI5 did not know the date of any proposed attack and the group's security awareness made it difficult to obtain further information.

The use of bulk acquisition data identified telephones being used by the group, and further enabled MI5 to identify previously unknown members of the group. MI5 was able to increase its coverage of this expanded group. As a result it became aware of a sudden further increase in activity from analysis of the group's communications activity and MI5 judged that an attack was imminent. Police intervened and recovered an improvised explosive device. A prosecution followed.

The Review team was given details which indicated that, without bulk acquisition data, the telephones would not have been identified.

Of course many ordinary people in Ireland, who have no part in politics (or insurgency), will simply shrug their shoulders at the above news and move on to the next item of interest. However, to do so is to **voluntarily submit to a system of mass surveillance** by a hostile foreign power, an Orwellian situation **that I pointed out as long ago as 2014:**

Since the late 1980s the British intelligence services have expanded from a programme of targeted spying on certain individuals and organisations to a strategy of observing and where necessary recording all electronic information relating to telephone calls, faxes, text messages, emails and general internet activities on or from this island nation. In large part that change in tactics was due to **the growth and importance of the internet and the increasing personalisation of computing technologies**. However it also reflected the simple fact that if the institutions of a state believe they can do something that will serve the interests of their state they will probably do so, however questionable it may be.

Of course on a more practical level online and remote surveillance was expected to reduce employee numbers and budgets for intelligence-gathering organisations, as well as the obvious risks encountered in the deployment of field agents. For hefty initial investments long-term savings were expected from the new model of "spying by accountants" championed by the NSA and others...

...this is not just a case of the British intelligence services secretly "tapping into" Irish telephonic and internet traffic via land and maritime cables. Rather in most cases they are being provided free (or commercial) access to the information by companies associated with the use, ownership or maintenance of these cables. And it is all information, every email you send, every message, every internet search or visit, every upload or download, albeit collated and filtered through layers of software programmes before being flagged up for human review (if required).


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6

COMMENTS



the Phoenix says:

August 21, 2016 at 07:41

4



0

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This

Hi Palace Barracks. Go fuck yourselves. Bye.



An Sionnach Fionn says:

August 22, 2016 at 07:48

1



0

Rate

This

If they're reading this they must be looking for something to do! 🐱



the Phoenix says:

August 24, 2016 at 04:51

0



0

Rate

This

I used to be on a site that was infested with the filth. 🐱 i always used to like to say hello to the c*ts lol



An Sionnach Fionn says:

August 24, 2016 at 14:02

0



0

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This

There's probably a few places they monitor, the obvious message boards, but really its all automated programs and semantic trawling. ASF might be on a list but it's very, very low down.



Seán McGouran says:

August 22, 2016 at 14:30

2



0

Rate

This

All this exhibitionist hardware is useless. British Intelligence (an oxymoron if ever there was one) relies on violence. My introduction to Palace Barracks consisted of being kicked about a big room. "Kicked about" there is not metaphor, being fed drugs ('uppers' apparently) and denied use of the toilet, fortunately I didn't humiliate myself, there was also the rattling of rifle bolts and pretend execution.



Graham Ennis says:

May 21, 2017 at 10:18



Rate

This

Sean, Thank You for speaking out and reminding everyone of just what the war against the Irish involved. People forget, or want to forget, or simply refuse to accept simple truths, about what happened. It needs to be forcibly reminded into the Brains of those who refuse to accept what happened, refuse to accept that the Irish People have a right of resistance, against oppression, or simply were supremely selfish and cowardly. The problem now though, is even far more complicated and dangerous than in your time, and the politics likewise. Nothing would give the British establishment more pleasure than to use the intelligence system, not only to spy, seeking enemies, or potential enemies, everywhere in Ireland, but to provoke, to destabilise legitimate political activity, and to twist the political situation in the North to their own advantage and hegemony. Their permanent objective is to undermine the Nationalist community in every way, to destabilise any group that is politically opposed to the Unionist micro-state, so as to preserve the status quo. This is why there is the obsessive spying on everyone and everything in Ireland. For the British "Deep State", everything Irish is a zero-Sum game. The only way to counter this is to get to the root of the problem, in the North. That is to stop playing the Game, by taking part in the Peace Agreement and the Tin-Pot Banana republic Assembly and Government, and total opposition to it. The only thing that is going to change things is to de-legitimise the present Northern Ireland "Government", refuse to take part, and use BREXIT as the main weapon, to force reunification by making the North ungovernable, unmanageable, and un-affordable. Such a strategy will bring violence, but not from the Irish Side. It will result in the UK state lashing out, and inflicting violence, disruption, and repression, on those who oppose it. We are then in a "West bank" situation. As the Palestinians discovered, the limited peace agreement and self-government simply ended up as a proxy police force for the Israeli's. The policy of non-participation, de-legitimation, and isolation, of London Rule, simply swamps any attempts to co-opt Irish People in their own oppression. The UK intelligence services can then spy all they want, but it will get them nowhere. The levers of power and influence via the present system in the North, would have been wrecked. It does not need any violence, from the Irish side. Indeed, that is exactly what the British "Deep State" is looking and hoping for, as it would freeze a situation much to their advantage, for another 30 years. Once again Sean, thanks for speaking up.

Comments are closed.

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Ghaelach, Éire Shaor

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Data Protection & Information Security Guide

April 2013

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INTRODUCTION TO THE GUIDE

About this Guide

In 2010, the Information Commissioner fined A4e £60,000 for losing an unencrypted / unprotected laptop containing data about over 20,000 clients from the Leicester and Hull Community Legal Advice Centres (CLAC). At the same time Hertfordshire County Council received a fine for a larger amount of £100,000 for repeatedly faxing sensitive information to the wrong recipient.

Data Protection and Information Security are important. Your obligations are enshrined in law and in your contract with the Legal Aid Agency (LAA) and failure to comply can have significant consequences, both for your Law Centre and for your clients.

This practical Guide is part of a set making up a toolkit for Law Centres. It is designed to help you process and manage data and information securely and to minimise your risk of breaching the legislation or LAA Standard Contract. It contains both guidance and helpful ideas for evaluating and managing your information and data related risk. It makes suggestions on how to ensure that you are compliant and provides some useful tools to assist with compliance.

Ensuring that you have robust data controls in place requires you to go through a step by step process. That process is set out below and each element is discussed in turn. Undertaking the process will require you to have a working knowledge of your statutory and contractual obligations.

Definitions and Principles

This Guide makes reference to a number of key terms used in The Data Protection Act 1998 (the Act). At **Appendix A** of this Guide is a summary of the key definitions in the Act 1998 and which are referred to throughout this Guide.

The Act lists eight Data Protection Principles and these are explained later in this Guide. At **Appendix B** of this Guide is a summary of those eight principles.

All references to the LAA Standard Contract are to the 2013 Standard Civil Contract.

DATA & INFORMATION SECURITY OBLIGATIONS

Statutory and Contractual Obligations

Your Law Centre is required to comply with the requirements of the Act as well as its contractual obligations in Clause 16 of the Standard Contract Terms.

For detailed guidance on the statutory and contractual obligations, it is necessary to read the Introduction to Data Protection and Information Security in **Appendix C** of this Guide.

There is no “one size fits all” solution to data protection and information security. The security measures that are appropriate for your Law Centre will depend on its circumstances, so you should adopt a risk-based approach to deciding what level of security you need. In practice, this means that a Law Centre must have appropriate security to prevent the data it holds being accidentally or deliberately compromised. In particular, a Law Centre will need to:

- Design and organise its security to fit the nature of the data it holds and the harm that may result from a security breach;
- Be clear about who in the Law Centre is responsible for ensuring information security;
- Make sure the Law Centre has the right physical and technical security, backed up by robust policies and procedures and reliable, well-trained staff; and
- Be ready to respond to any breach of security swiftly and effectively.

The Process

The table below sets out the steps that you should be going through to ensure that you have proper data processing and security systems in place.



AUDIT & ASSESSMENT

The Information Audit

Before being able to consider whether you are compliant with your statutory and contractual obligations you need to undertake a detailed information and data audit. This will help you understand what data and information you hold and process, why you hold it and what you do with it. Once you have this information you can determine what the associated risks and compliance issues may be and decide what to do to mitigate those risks.

The reality is that, as a Law Centre, you will be holding and processing a significant amount of information and data. If that information or data is Personal Data, as defined by the Act, then it is afforded special protection and your obligations in respect of it are increased.

To undertake the information audit, you will need to consider what information and data you process (gather, hold, use and/or disclose), how you process it and why you process it.

An example is provided below.

INFORMATION AUDIT FORM		
BLACKMORE COMMUNITY LAW CENTRE		
AUDIT DATE: March 2013		
Information / Data	How is it processed and where is it stored?	Why is it processed?
Client name, address and contact information.	Gathered and held on individual client files, on the Case Management System and on the Word copy of the Client Information Form saved on the H Drive. Also on AdviceLine Sheets in Folder at front desk and	To progress casework and contact the client. To report to funders or provide on audit. In case of complaints or claims against the centre.

	<p>in Queries Cabinet.</p> <p>Accessed by caseworkers, volunteers and support staff to progress cases.</p> <p>Sent to Counsel, experts and costs draftsmen as necessary.</p> <p>Occasionally stored on memory sticks or emailed where staff work from home.</p> <p>Taken to court or conferences where necessary.</p>	
Client Case Information	As above	As above and to provide to auditors for to maintain the Specialist Quality Mark (SQM).
Client Financial Information	As above	To establish eligibility for funding and for Audit.
Client Equalities Information	As above	To provide to funders upon request.
Information on Job Applicants	<p>Stored in box in manager's office.</p> <p>Accessed by manager and evaluation panels.</p>	<p>Used to consider appropriateness for job.</p> <p>Used in case of complaints or possible claims.</p> <p>Use to notify applicants in case other jobs arise.</p>
Personnel Files	<p>Stored in files in cabinet in manager's office.</p> <p>Documents stored on the H Drive.</p> <p>Accessed by manager, finance officer and Board.</p>	<p>Used to record employment history, staff appraisals, etc..</p> <p>Used in case of complaints or possible claims.</p> <p>Kept for the purposes of providing references.</p>

Contact & Quality Details for Experts & Counsel	Kept in Experts & Counsel Folder in the library. Available to all staff.	Kept for the purposes of deciding which Counsel and experts to use.
---	---	---

It is important to include all types of information that you hold. This is likely to include:

- Client files and information
- Billing and financial information
- Creditor / customer information
- Staff and recruitment information
- AdviceLine / Enquiry Sheets
- Random emails from people asking for advice
- Expert and Counsel Information
- File review sheets
- Training records
- Policies, procedures etc.
- Donor lists / databases
- Friends / Supporters contact details
- Management Committee / Board Member details
- Minutes of meetings etc.; and
- Risk Assessments

A sample Information Audit sheet is provided in **Appendix D** of this Guide.

Once you have undertaken the information audit you will then be able to understand what information you hold and process, where you hold it and how you process it and the reasons why you hold and process that information. You can then undertake the Information Risk Assessment.

Information Risk Assessment

The purpose of the risk assessment is to determine the risks which present themselves in respect of the information that you are holding and processing.

The Introduction to Data Protection and Information Security in **Appendix C** of this Guide provides more information which may assist you in understanding the areas of risk.

There are a number of key rules that you must comply with. These include:

- Data must not be used for unlawful or unfair purposes. Data can only normally be used for the purposes for which it was obtained;
- Data must be accurate and you must be able to correct it, if it is shown to be inaccurate;
- Data must be available to the Data Subject (see pg 23) if requested;
- Data can only be held as long as is necessary to complete the task (and any associated tasks);
- Law Centres must make sure that data is not lost or corrupted, and that it can be restored if needed; and
- Data must be held securely and cannot be inadvertently disclosed to anyone who should not have access to it.

Therefore the questions to ask on the audit are:

- Do you need to be holding the data at all?
- Are you holding it and using it for the reasons you said you would?
- Did you take steps to ensure its accuracy and could you correct it if needs be?
- Can you find it and disclose it to the Data Subject if they ask?
- Are you holding it longer than you need to?
- Is there a danger that it could be lost?
- Is there a danger that someone who shouldn't see it could see it?

This risk assessment should take account of factors such as:

- The nature and extent of your Law Centre's premises and computer systems;
- The number of staff and volunteers you have;
- The extent of their access to the Personal Data. Factors to consider include whether all staff should be permitted the same level of access to all data and whether volunteers should be permitted the same level of access as staff; and
- Personal Data held or used by a third party on your behalf (under the Act you are responsible for ensuring that any data processor you employ also has appropriate security).

You need to ask these questions about each item / class of data and determine what the risks are. As with all risk assessments it is helpful to determine the likelihood of the risk materialising and then, if it were to materialise, the impact of the risk.

This will help you focus on your key areas of risk.

Having identified them you then need to determine what steps you can take to mitigate that risk.

The most obvious kind of information held by a Law Centre is client information –

names, addresses, dates of birth, ethnicity data (which is, of course, sensitive personal data), and the details about the client's legal problem.

What are the potential risks involved in holding client information?

Firstly, the information could be incorrect – in that it may have been entered into the file or onto the computer incorrectly; it could be out of date if it hasn't been recently checked; it could be inadequate for your purposes or perhaps unnecessary; you may have been holding it for much longer than was ever necessary – all of which would possibly put you in breach of the Act.

What about the risks involved in processing the data?

The files may be disorganised, which means that the accuracy and relevance of the data cannot be assured. The data is on an unsecured computer that is accessible to staff or individuals who should not have access to the information. Caseworkers may have the data on their laptop or on a memory stick, both of which could easily be lost or stolen.

Below is an example of a possible risk assessment:

Risk	Likelihood	Impact	Mitigation
<i>Data Type: Client Data</i>			
Data could be inaccurate	Medium	High	Ensure that staff are trained on the importance of accurate data; introduce pro-forma client instruction forms specifying what data is necessary; ensure that all data collected is checked with clients; ensure that any computer data entry is done by adequately trained and supervised staff and is spot checked for accuracy
Data could be kept for too long	Medium	Medium	Ensure that there is a clear data and document destruction policy and that all data / files are properly diarised for destruction.

Processing Type: Removable Media (Flash Drives / Memory Sticks / DVD's etc.)			
Risk that multiple and differing copies of data and information might emerge	Medium	High	Ensure that there is a clear document version control policy; avoid the use of removable media and instead use cloud server technology (see below) to ensure that only a single copy is necessary.
Risk that information may be easily lost or stolen.	High	High	Ensure that all removable media is properly encrypted; ensure that all staff are fully trained on data security; prohibit the use of removable media and instead move to cloud server technology.

A sample information risk assessment form is provided at **Appendix E** of this Guide.

POLICIES AND PROCEDURES

Having identified your key data risks you need to define a data usage / information security policy and procedures which inform staff, clients, funders and other stakeholders of your approach to data and the steps that you take to ensure compliance with the Act and to minimise data risk.

The LAA Data Security requirements set out the policies which a Law Centre must have in place and these include policies on information risk management, data protection, IT security and incident management.

An example of a Data Protection Policy is attached at **Appendix G** and examples of Information Security and Information Risk Management Policies are attached at **Appendix H** of this Guide and these can be adapted to suit the needs of your Law Centre.

It is also important for every Law Centre to have a Document Retention / Destruction Policy. This should clearly set out how long each class of information is to be kept and when it can and should be destroyed (and, where necessary, what should be kept). An example of a Document Retention and Destruction policy is in **Appendix F** but should be adapted where appropriate to meet your own operational and data storage needs.

It is important that your policies are backed up by very clear procedures and protocols governing the use of data. It is important to understand that the requirements of the Act go beyond the way information is stored or transmitted. The seventh data protection principle relates to the security of every aspect of your processing of Personal Data and states as follows:

“Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.”

The security measures your Law Centre adopts should ensure that:

- Only authorised people can access, alter, disclose or destroy personal data
- Those people only act within the scope of their authority; and
- If personal data is accidentally lost, altered or destroyed, it can be recovered to prevent any damage or distress to the individuals concerned.

The Act says that you should have security that is appropriate to:

- The nature of the information in question; and
- The harm that might result from its improper use, or from its accidental loss or destruction.

However, it is not sufficient just to have clear policies and procedures. All staff and volunteers need to be trained on the policies and procedures and, the rules you set down also need to be policed. It is important that breaches of the policy or procedures have consequences. Law Centre's should check that their employee contracts and volunteer agreements, as well as their disciplinary procedure include breaches of these procedures and rules.

SOME HELPFUL HINTS AND TIPS

Data Protection Notice

Make sure that you process data lawfully by clearly telling clients what you will be using their data for. You can achieve this by having a standard Data Protection Notice which you give to any client that provides you with personal data that you intend to store and process. An example notice might look something like:

“We will hold the information that you provide to us in accordance with the provisions of the Data Protection Act 1998. We will only use it for the purposes of assisting you with your case and for complying with our obligations to funders, who may want to audit some or all of that information to check the quality of our work. You can ask for a copy of any information that we hold about you and ask us to correct anything that we have wrong. Your information will be held securely and will remain confidential. Eventually, in line with our Document Retention and Destruction Policy (a copy of which is on our website) we will destroy the information.”

Your notice should be included in client care letters, on your website, on notices handed to clients who receive one-off advice in reception or at outreach sessions. Clients calling in for advice should be made aware of it, possibly by referring them to the Law Centre website.

Contracts with Third Parties

Sometimes it is necessary to pass data to a third party for processing. This may be an outsourced activity such as an external typing service or a costs draftsman, an expert or barrister, a file storage company or a computer server provider. Whenever you do so make sure that you have evaluated the third party's own data security policy and that you have a contract with them which compels them to comply with the Act and indemnify you in case of any breach by them or action by them that would put you in breach of the Act, for example, loss or unlawful disclosure of the data¹. Make sure that the contract requires them to tell you immediately if the data is lost or inappropriately disclosed.

Encrypting & Password Protecting

Any time a document containing Personal Data (or especially Sensitive Personal Data) is sent by email (which is generally accepted to be unsecured) or taken away from the office on any form of removable media (such as a memory stick, portable hard drive,

¹ You may also wish to consider having in place an Outsourcing Policy to ensure that these precautions are undertaken routinely. A sample Outsourcing Policy is available as part of the Quality Manual section of this toolkit.

CD or DVD) it is vulnerable to loss and to unlawful disclosure.

If it is necessary to email data or to use removable media, any documents should be password protected and encrypted.

There are a number of encryption products to download, including TrueCrypt, SecureZip, PGP Desktop and DESlock. Details of all of these can be found by searching them on the internet. You can find out more about encryption at the government and business sponsored website www.getsafeonline.org.

In addition, the password protection / encryption facilities already built in to MS Office allow 128 Bit advanced encryption, provided you use a “strong” password (see below). Depending on which version of Windows and MS Office you have there are different ways to password protect / encrypt a file (or even a folder). The two main ways are:

To encrypt a folder or file

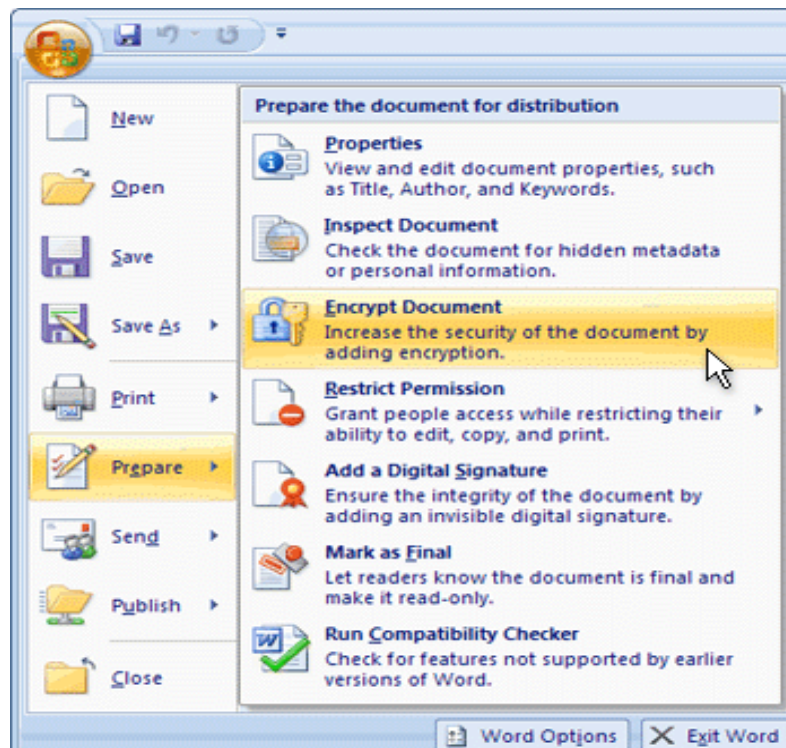
- Right-click the folder or file you want to encrypt, and then click ‘Properties’
- Click the ‘General’ tab, and then click ‘Advanced’
- Select the ‘Encrypt contents to secure data check’ box, and then click OK

To set a password in a Word document

To encrypt your file and set a password to open it, click the Microsoft Office Button



, point to ‘Prepare’, and then click ‘Encrypt Document’.




In the 'Encrypt Document' dialog box, in the 'Password' box, type a password, and then click OK.

You can type up to 255 characters and should aim to use a strong password – see below.

In the 'Confirm Password' dialog box type the password again, and then click OK. To save the password, save the file.

To remove password protection from a Word document

Use the password to open the document.

Click the Microsoft Office Button , point to 'Prepare', and then click 'Encrypt Document'.

In the 'Encrypt Document' dialog box, in the 'Password' box, delete the encrypted password, and then click OK. Save the file.

Remember: This only encrypts the document but not an email. If you attach the document to an email the contents of the document will be safe but the contents of the email will not – so do not write anything confidential in the email – keep it all in the attachment. Never include the password in the email as this would make it possible for any recipient, even an unintended recipient, to open the encrypted attachment. Send the password separately or, better still, telephone the recipient with the password.

Secure encrypted email systems can be purchased and companies like PKWare and Symantec offer solutions. If you want to install a secure email system you should discuss it with your IT provider as you will need the right system for your hardware and email server.

Another option to consider is signing up to the Government's Criminal Justice Secure (CJSM) email system. Despite its name, this system is open to any organisation working within the legal sector and it allows for secure emails to be sent between members – but only between members. This means that if you send an email to a non-member then it will no longer be secure. This system could be an option for sending emails to courts, Counsel, experts – provided that they were also signed up. This system could also be used for sending emails to the LAA as all emails from the LAA are sent via the CJSM's email system. Full details can be found on the CJSM website at www.cjsm.net.

Strong Passwords: Length and Complexity

A strong password should be long and include letters, punctuation, symbols, and numbers. Whenever possible, use eight characters or more.

NEVER use the same password for everything and change them regularly – at least every three months.

The greater the variety of characters in your password the better. However, password hacking software automatically checks for common letter-to-symbol conversions, such as changing "and" to "&" or "to" to "2."

Use the entire keyboard, not just the letters and characters you use or see most often. An example of a bad password is "password" or "January" or any name or word easily associated with you.

A strong password might be something like "lw2><biH3*dZ" which mixes both upper and lower case letters, numbers, symbols and punctuation.

Using a Cloud Server instead of Memory Sticks and Removable Media

Sometimes it is essential for data to be taken away from the office. This may be to allow working from home or other remote working. Every time a document is emailed to a home PC or taken away from the office on a memory stick or CD there is a significant risk of loss or unlawful disclosure. In addition, if working from home is allowed, there is also a risk that copies of sensitive documents may be left on staff home computers – even if they think they have deleted them.

These problems can be minimised or avoided altogether by using what has become known as a Cloud service.

Clouds are secure online file storage spaces that you can log in to using any normal Web Browser (Firefox, Internet Explorer, Google Chrome etc.).

In effect you log into the site at the office and upload the document (still encrypted to be safe). You can then log into the Cloud site from your home PC or Laptop and edit the document before saving it back onto the Cloud. They work very much like normal servers only they are online rather than in a room in your Law Centre.

As your Cloud access is also password protected (and you should also use a strong password for this) there is little or no chance that anyone could access the data and no chance that it could be lost – unlike leaving a laptop in a bar or losing a memory stick on the bus!

There are a number of available Cloud server solutions, however it is essential to use one which you know to be secure and that meets the requirements of the Data Protection Act. This can be difficult as some may appear to be UK or EU based but actually hold the data on servers outside of the EU – and in countries without equivalent data protection safeguards. Remember, the Data Protection Act says that “Personal data shall not be transferred to a country or territory outside the EEA unless that country or territory ensures an adequate level of protection for the rights and freedoms of Data Subjects in relation to the processing of personal data”.

As a minimum you should look for a Cloud service based in the EU or in the US, provided that US provider is a member of the “Safe Harbor” scheme. By joining the Safe Harbor scheme, a US company agrees to:

- Follow seven principles of information handling; and
- Be held responsible for keeping to those principles by the Federal Trade Commission or other oversight schemes

A full list of US companies currently signed up to the Safe Harbor scheme can be found on the US Department of Commerce website. Full guidance on transferring data outside of the EU can be found on the Information Commissioner’s website at http://www.ico.gov.uk/for_organisations/data_protection/the_Guide/principle_8.aspx.

Amongst the most popular Cloud providers are SugarSync, Apple iCloud, Google Cloud – all of which are signed up to the Safe Harbor scheme and most of which offer a free basic package but require annual subscriptions for extended memory, functions or networking. Some are easier to use than others. DropBox is a commonly used Cloud based solution but, at present, does not comply with the Safe Harbor requirements and so may need to be avoided until it is compliant.

Microsoft also offers Office 365 which provides virtually anywhere access to email, documents, contacts and calendars. There are also bespoke packages offered by companies such as Livedrive and Cloudserve offering secure online backups and individual staff clouds for an annual fee (for example £999.95 for 10+ users with Livedrive).

Although Safe Harbor is a starting point, you should take time to scrutinise the data security information and confidentiality guarantees of whichever Cloud service that you use and you should keep a record of the checks you make. If something did go wrong, for instance if the Cloud service was hacked and confidential data lost or stolen, you could at least demonstrate to the Information Commissioner that you took reasonable steps to ensure data security.

Lock the Doors: Who can access the data?

It sounds obvious but work out who can gain access to the Law Centre and who can therefore see the files and any data on them. Are clients interviewed in offices and are they ever left on their own? Can cleaners or maintenance workers access files – even after hours? What about pro-bono solicitors and volunteers working on evening advice sessions?

Make sure that anyone who has access to data has signed a confidentiality agreement. As far as you can enforce a clear desk policy and make sure that files are, where possible, kept in locked filing cabinets.

Make sure that all access doors are locked or coded to stop unauthorised access.

Computers & Internet

Make sure that all computers (including laptops and tablets) are password protected with strong passwords (and that those passwords are changed regularly). Ensure that you have up-to-date anti viral and firewall software installed and make sure that someone is responsible for downloading and installing the anti viral software updates as new viruses and hacks are being developed all the time.

Make sure that all saved files are regularly backed up, preferably to a secure offsite server or Cloud (as discussed above).

Tell People about Data Protection and Information Security

Most people don't think about data security. Most won't realise the dangers in sending emails to themselves at home or copying work on to a memory stick. Most won't bother using strong passwords or encrypting documents. Most won't want to regularly change their login passwords or see the benefits in a clear desk policy. Everyone should know about the policies and understand the risks involved.

Add data security training to your Law Centre's induction programme and into existing staff training plans. Offer update training where necessary and make sure that it is part of your training for volunteers and interns.

It is also worth considering adding data protection and information security issues to the agenda for one-to-one supervision meetings or appraisals, certainly until any new information security regime has bedded in.

What should you do if there is a security breach?

If, despite the security measures you take to protect the data, a breach of security occurs, it is important that you deal with it effectively. The breach may arise from a theft, a deliberate attack on your systems, from the unauthorised use of Personal Data by a member of staff, or from accidental loss or equipment failure.

However the breach occurs, you must respond to and manage the incident appropriately. Having a policy on dealing with information security breaches is another example of an organisational security measure you may have to take to comply with the seventh data protection principle.

There are **four** important elements to any breach management plan:

- Containment and recovery – the response to the incident should include a recovery plan and, where necessary, procedures for damage limitation
- Assessing the risks – you should assess any risks associated with the breach, as these are likely to affect what you do once the breach has been contained. In particular, you should assess the potential adverse consequences for individuals; how serious or substantial these are; and how likely they are to happen
- Notification of breaches – informing people about an information security breach can be an important part of managing the incident, but it is not an end in itself. You should be clear about who needs to be notified and why. You should, for example, consider notifying the individuals concerned; the Independent Commissioners Office (ICO); other regulatory bodies; other third parties such as the police and the banks; or the media
- Evaluation and response – it is important that you investigate the causes of the breach and also evaluate the effectiveness of your response to it. If necessary, you should then update your policies and procedures accordingly

APPENDIX A - DEFINITIONS

In order to fully understand the requirements of The Data Protection Act 1998 (the Act) including any of the Data Protection Principles, it is necessary to understand some of the terminology used in the Act. Set out below is a summary of the key definitions in the Act 1998, which are referred to throughout this Guide. Further information on each of these areas is contained in the Introduction to Data Protection and Information Security in **Appendix C** of this Guide.

Data means information which

- (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose;
- (b) is recorded with the intention that it should be processed by means of such equipment;
- (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system;
- (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68; or
- (e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d).

Personal Data means data which relate to a living individual who can be identified

- (a) from those data; or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller;

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

Sensitive Personal Data means personal data consisting of information as to

- (a) the racial or ethnic origin of the data subject;
- (b) his political opinions;
- (c) his religious beliefs or other beliefs of a similar nature;
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992);

- (e) his physical or mental health or condition;
- (f) his sexual life;
- (g) the commission or alleged commission by him of any offence; or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

Processing, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including

- (a) organisation, adaptation or alteration of the information or data;
- (b) retrieval, consultation or use of the information or data;
- (c) disclosure of the information or data by transmission, dissemination or otherwise making available; or
- (d) alignment, combination, blocking, erasure or destruction of the information or data.

Data Subject means an individual who is the subject of personal data.

Data Controller means a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed.

Relevant Filing System is any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.

APPENDIX B – DATA PROTECTION PRINCIPLES (SUMMARY)

Set out below is a short summary of the eight Data Protection Principles in The Data Protection Act 1998 (the Act) which are explained throughout this Guide.

Schedule 1 to the Act lists the data protection principles in the following terms:

Principle 1:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

Principle 2:

“Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.”

Principle 3:

“Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.”

Principle 4:

“Personal data shall be accurate and, where necessary, kept up to date.”

Principle 5:

“Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.”

Principle 6:

“Personal data shall be processed in accordance with the rights of Data Subjects under this Act.”

Principle 7:

“Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of Personal Data and against accidental loss or destruction of, or damage to, Personal Data.”

Principle 8:

“Personal Data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of Personal Data.”

APPENDIX C - DATA PROTECTION & DATA SECURITY OBLIGATIONS

DATA PROTECTION

The Data Protection Act 1998 (the Act) was born out of a European Directive which was, of itself, born out of a fear that personal information held on computers was capable of being incorrectly used and accessed and that, if wrong, any decisions based on such information could also be flawed.

Those framing the legislation believed that the collection, storage and use of data should be defined by a set of clear and unambiguous principles. An understanding of the Act requires an understanding of the eight Data Protection Principles set out in that Act.

The Data Protection Principles are set out below with detailed notes about each principal. However, Law Centres should also be aware of their obligations under the LAA Standard Contract.

The Standard Contract

Contractual data protection and information security obligations are set out in Clause 16 of the Standard Contract Terms.

“16.3 In respect of the Shared Data:

- (a) You will be responsible for and will at all times comply with the Data Controller’s obligations under the Data Protection Legislation in respect of Processing carried out in connection with the performance of this Contract, including in respect of the confidentiality, integrity and security of that Data and the transfer of that Data to LAA as envisaged under this Contract;*
- (b) LAA will be responsible for compliance with the Data Protection Legislation in respect of that Shared Data which is actually received and Processed by LAA as a Data Controller;*
- (c) it is not expected that either us or you will be responsible under the Data Protection Legislation for a breach of the Data Protection Legislation by the other party.*

16.4 You will not Process the LAA Data or Shared Data except as necessary for the performance by you of your obligations under this Contract (including the performance of Contract Work) or as otherwise expressly authorised in writing by the LAA.

16.5 You will perform your obligations under this Contract in such a way that you do not cause us to breach any of our applicable obligations under the Data

Protection Legislation.

- 16.6 *You will ensure that you obtain and maintain all consents, licences and registrations required to enable you to provide Personal Data to LAA as envisaged by this Contract, including consents from Clients, Former Clients, and Data Controllers (other than us) and such notifications with the Information Commissioner's office as are required for you to comply with the Data Protection Legislation.*
- 16.7 *You will not transfer the LAA Data or Shared Data outside of the European Economic Area without our express prior written approval.*
- 16.8 *You will supply originals or copies of the LAA Data and Shared Data to us in accordance with Clause 9.1. You will not assert proprietary or other rights in law or in equity as a reason for not supplying LAA Data and Shared Data in accordance with this Contract.*
- 16.9 *Without prejudice to Clause 16.3(a) in respect of the Shared Data and LAA Data processed by you or on your behalf:*
- (a) you will take responsibility for preserving the confidentiality and integrity of LAA Data and Shared Data which is Processed by you and preventing the corruption or loss of such LAA Data or Shared Data;*
 - (b) you will take responsibility for ensuring that up-to-date back-ups of the LAA Data and Shared Data which is in electronic format are stored;*
 - (c) you will use best endeavours to comply with the Data Security Requirements;*
 - (d) you will have regard to the Data Security Guidance;*
 - (e) you will ensure that any system on which you hold any LAA Data and Shared Data, including back-up information, is a secure system that complies with your obligations under Clause 16.9(c) and you will provide us with a written description of the technical and organisational methods employed by you for Processing such Data (within the timescales required by us) if so requested by us;*
 - (f) you will take reasonable steps to ensure the reliability of any of your personnel and any third parties appointed pursuant to Clause 3 who have access to such data and ensure that such personnel are informed of its confidential nature and your obligations under Clauses 15, 16 and 17 and comply with those obligations; and*
 - (g) you will report to the LAA any incident that results in the disclosure of LAA data and Stored Data to unauthorised recipients."*

'Shared Data' means "Personal Data which is Processed in connection with the

performance of this Contract by the Provider in respect of which the Provider is a Data Controller either alone or in common with the LAA which will be transferred from the Provider to the LAA or which the LAA is entitled to request in accordance with this Contract including documents held on Contract Work files which are necessary for the conduct of the relevant Matter or case and which we may require in order to assess your compliance with your obligations under this Contract."

The LAA has developed the concept of Shared Data, meaning any data held by you for the purposes of your performance of the Contract.

LAA's Data Security requirements

The Contract refers to the LAA's Data security requirements and guidance. These documents are published on the legal aid section of the MoJ's website and comprise the basic requirements which providers must meet to maintain the security of data processed on behalf of or with the LAA and provide more detailed information on how these requirements can be met.

By way of a summary of the LAA's requirements, Law Centres that provide legal services are required to ensure that the following operational measures are in place to maintain the security of its data.

Registration with the Information Commissioner's Office (ICO)

Law Centres must ensure that they are registered with the ICO (unless an exemption applies) and must appoint a senior member of staff as a Data Protection Supervisor with overall responsibility for data protection and information security.

Culture and staff awareness

The requirement states that plans must be place *"for fostering a culture within the organisation"* that values, protects and uses information for the public good and in accordance with the Data Protection Principles set out in the Data Protection Act 1998. In addition, Law Centres must maintain a level of staff awareness and in particular, have in place an induction plan to raise awareness to new staff on Data Protection obligations.

Policies

Law Centres must have in place a coherent set of policies including policies on:

- Information Risk Management;
- Data Protection compliance;

- IT security, which includes an Acceptable Use Policy that outlines the type of behaviour expected from staff when using technology and the consequences for abusing technology privileges;
- Information Security, to include restricting use of portable media (e.g. USB memory sticks, discs, laptops etc.);
- Human Resources standards that reflect performance in managing information risk and complying with above policies, incorporating sanctions against failure to comply; and
- Clear desk policy
- Incident Management for reporting, managing and recovering from information risk incidents, including losses of personal data and ICT security incidents.

Law Centres must also conduct an annual review of the effectiveness of the policies.

Procedures

Law Centres must have measures in place for controlling access to personal data and restrict access to authorised staff only. They must also restrict access to the minimum personal data necessary and/or relevant to job role.

Where appropriate, Law Centres should conduct Privacy Impact Assessments of any new system developments or projects, using the Information Commissioner's Handbook for guidance (see

http://www.ico.gov.uk/upload/documents/pia_handbook_html_v2/index.html)

Law Centres must conduct appropriate screening of staff and carrying out background checks to ensure reliability and to maintain records of staff, agents' and approved third parties' access to personal data. There is also a requirement for an audit trail of activities undertaken and review the audit trail for compliance with policies.

Law Centres must have implemented a whistle-blowing procedure for staff to raise concerns about or breaches of IT security.

Law Centres must introduce and maintain adequate physical security for premises that are used to store, process or transmit personal or protectively marked information and provide secure areas for storing personal and protectively marked information.

There must be a procedure for the controlled disposal of records.

Finally, Law Centres must have in place business continuity plans, including disaster recovery plans.

Definitions

In order to understand any of the Data Protection Principles, it is necessary to understand some of the terms used in the Act.

Personal Data

Personal Data means:

“..data which relate to a living individual who can be identified

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the Data Controller, and includes any expression of opinion about the individual and any indication of the intentions of the Data Controller or any other person in respect of the individual.”

The important elements of the definition are that the individual is living and that he or she can be identified from that data or from that data and other information held by the Data Controller. Personal Data also includes expressions of opinions and intentions.

Sensitive Personal Data

Sensitive Personal Data means Personal Data:

“... consisting of information as to

(a) the racial or ethnic origin of the Data Subject,

(b) his political opinions,

(c) his religious beliefs or other beliefs of a similar nature,

(d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),

(e) his physical or mental health or condition,

(f) his sexual life,

(g) the commission or alleged commission by him of any offence, or

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.”

The presumption is that, because information about these matters could be used in a discriminatory way, and is likely to be of a private nature, it needs to be treated with greater care than other Personal Data. In particular, if you are processing sensitive Personal Data you must satisfy one or more of the conditions for processing which

apply specifically to such data, as well as one of the general conditions which apply in every case. The nature of the data is also a factor in deciding what security is appropriate.

The categories of Sensitive Personal Data are broadly drawn so that, for example, information that someone has a broken leg is classed as sensitive personal data, even though such information is relatively matter of fact and obvious to anyone seeing the individual concerned with their leg in plaster and using crutches. Clearly, details about an individual's mental health or serious medical conditions, for example, are generally much more "sensitive" than whether they have a broken leg. However for the purposes of data security all sensitive personal data should be treated with caution.

Data Subject

A Data Subject means an individual who is the subject of Personal Data.

For Law Centres the Data Subjects are likely to be:

- Staff
- Volunteers
- Board and Management Committee members
- Contractors
- Clients
- Opponents
- Experts
- Witnesses; and
- Counsel

Indeed anyone about whom you hold any form of Personal Data (name, address, date of birth, occupation, expression of opinion or intention etc.).

Data Controller

As the holder of such data you are deemed to be the Data Controller, defined in the Act as:

"a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed."

Processing

Processing, in relation to information or data, means:

"obtaining, recording or holding the information or data or carrying out any

operation or set of operations on the information or data, including:

- (a) organisation, adaptation or alteration of the information or data,*
- (b) retrieval, consultation or use of the information or data,*
- (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or*
- (d) alignment, combination, blocking, erasure or destruction of the information or data."*

The definition of Processing is very wide and it is difficult to think of anything a Law Centre might do with data that will not be Processing!

Relevant Filing System

Lastly, in order to be caught by the Act, that personal data has to be on a computer or on a paper file and kept in a Relevant Filing System. A Relevant Filing System is defined as:

"any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible."

Basically, if there is any way that you can search for and find information relating to a specific individual (whether by name, reference number, date of attendance etc.) then that will be a relevant filing system. In terms of computer data the search facilities in MS Windows / Mac OS make it possible to search for any string of words or names – regardless of how they are otherwise organised on the computer.

The Data Protection Principles

Principle 1: Fair and Lawful Processing

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless

- (a) at least one of the conditions in Schedule 2 is met, and*
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

This Principle means that you are not permitted to handle any Personal Data unless the conditions set out in the Schedules to the Act are met. If they are not then handling that data would be illegal.

If your Law Centre wants or needs to process any information about a living individual and that individual can be identified from that data then you can only do so if the First Principle is satisfied. In order to determine this you have to look to Schedule 2 of the Act if it is straightforward Personal Data or to Schedule 3 if it is Sensitive Personal Data.

Processing of Personal Data

For straightforward Personal Data, Schedule 2 sets out six conditions relevant for purposes of processing any Personal Data. Those conditions are:

1. The Data Subject has given his or her consent to the processing.
2. The processing is necessary:
 - a. for the performance of a contract to which the Data Subject is a party;
or
 - b. for the taking of steps at the request of the Data Subject with a view to entering into a contract.
3. The processing is necessary for compliance with any legal obligation to which the Data Controller is subject, other than an obligation imposed by contract.
4. The processing is necessary in order to protect the vital interests of the Data Subject.
5. The processing is necessary:
 - a. for the administration of justice;
 - b. for the exercise of any functions conferred on any person by or under any enactment;
 - c. for the exercise of any functions of the Crown, a Minister of the Crown or a government department; or
 - d. for the exercise of any other functions of a public nature exercised in the public interest by any person.
6. The processing is necessary for the purposes of legitimate interests pursued by the Data Controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the Data Subject.

For the most part you will be relying on the first condition, namely that the Data Subject (the client or staff member) has given their consent for you to hold the data but in some cases (where the Data Subject is say the opponent) you will have to rely on one of the other conditions, probably condition 6.

Because consent is likely to be necessary for most Data Subjects, it is important that you tell clients and others that you will be holding and processing their data – and as you will see when we discuss the Second Principle, it is important that you tell them how you will be processing that data and what you will be using it for.

Sensitive Personal Data

The conditions set out in Schedule 3 for the processing of Sensitive Personal Data are, not surprisingly, even more stringent. The first condition in Schedule 3 is that the client has given “explicit” consent. This means that it is not sufficient that a client has merely received a clear data protection notice but that they have been told specifically about the nature of the Sensitive Personal Data being held / processed and that they have, either by written or verbal communication or by their actions, given explicit consent to your having and processing that data. Clearly, if they provided that data to you, then explicit consent can be deemed to have been given.

Tip: This can be achieved by including a clear data protection / information use notice in your standard client care letter.

But what about Data Subjects who don’t get a client care letter (e.g. drop in or one-off outreach clients who do not get subsequent casework)? Perhaps you should consider producing a short form data protection notice / consent form for such clients.

The First Data Protection Principle basically means that you must:

- Have legitimate grounds for collecting and using the personal data
- Not use the data in ways that have unjustified adverse effects on the individuals concerned
- Be transparent about how you intend to use the data, and give individuals appropriate privacy notices when collecting their personal data
- Handle people’s personal data only in ways they would reasonably expect; and
- Make sure you do not do anything unlawful with the data

Principle 2: Specified Use

“Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.”

This Principle means that you can only use the data for the purposes for which it was obtained (and only insofar as those purposes satisfy the conditions in Schedules 2 and

3 discussed above). You must not use personal data for other purposes.

You need to be clear about the purposes for which you intend to use the data. You cannot collect and hold the data for an agreed purpose – say the provision of legal advice – and then use it for a wholly different purpose – say direct marketing, fundraising or selling on to others.

Principles 3, 4 and 5: The Information Standards

Principle 3:

"Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed."

Principle 4:

"Personal data shall be accurate and, where necessary, kept up to date."

Principle 5:

"Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes."

As well as setting out the rules for collecting and using personal data, the Act sets standards that personal data must meet before you can use it. The standards are that personal data should be:

- Adequate, relevant and not excessive;
- Accurate and, where necessary, kept up to date; and
- Kept for no longer than necessary.

There are clear links between the three standards (the third, fourth and fifth data protection principles) and you need to be aware of how they connect. For example, if you don't update information when circumstances change, information that was originally adequate becomes inadequate. If information is kept for longer than necessary, it may be irrelevant and excessive.

In most cases, deleting or adding items of personal data should ensure that the information you hold complies with all three standards. However, you must check the quality of the information you hold before you use it.

From then on, you should regularly review the information to identify when you need to do things like correct inaccurate records, remove irrelevant ones and update out-

of-date ones. You may not always be able to check the quality of every record you hold, but you should at least be able to check a sample.

In checking that the personal data you hold meets the information standards, you should consider:

- The number of individuals whose personal data you hold
- The nature of the information
- What you use it for, and how you use it
- The way you obtained it
- How long you hold it for; and
- The possible consequences for the individuals concerned of retaining or deleting the information

Principle 8 – Sending personal data outside the European Economic Area

“Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of Data Subjects in relation to the processing of personal data.”

As the Act resulted from a European Directive, all other EEA member states will also have similar domestic legislation and therefore you can transfer information within the EEA fairly safe in the knowledge that the recipients will be bound by similar rules. This is not however the case where information is transferred outside the EEA.

So when are non EEA transfers of information likely?

There are limited circumstances where a Law Centre is likely to transfer personal data out of the UK, let alone out of the EEA, but it is possible. Some situations where this may happen are:

- Where you use an overseas digital typing service – many of which are based in South Africa, India or Pakistan
- Where you use an off-site server, cloud server or backup server for your computers – some of which may be overseas and outside of the EEA or US Safe Harbor scheme
- Where an employee goes on holiday and takes data with him or her – or has data transferred / emailed to him or her to do urgent work

If you know that your typing service is based overseas or that your servers are outside the EEA then you must take reasonable steps to ensure that the jurisdiction has an

adequate level of protection for the rights and freedoms of Data Subjects in terms of the processing of personal data – which means ensuring that the law in that jurisdiction protects personal data from improper disclosure and use.

You should note that, if you intend to use an overseas-based typing service, the Standard Contract also requires you to get approval from the LAA.

All transfers, as with all data processing, must be undertaken in accordance with the Seventh Data Protection Principle (see below).

DATA SECURITY

NOTE

The Information Commissioner's website has published detailed guidance on information security and subject access. Much of the guidance below is taken directly from their site.

http://www.ico.gov.uk/for_organisations/data_protection.aspx

Why should you worry about information security?

Information security breaches may cause real harm and distress to the individuals they affect – lives may even be put at risk. Examples of the harm caused by the loss or abuse of Personal Data (sometimes linked to identity fraud) include:

- Witnesses at risk of physical harm or intimidation
- Offenders at risk from vigilantes
- Exposure of the addresses of personnel and clients; and
- Fake applications for tax credits

Not all security breaches have such grave consequences, of course. Many cause less serious embarrassment or inconvenience to the individuals concerned. Individuals are entitled to be protected from this kind of harm as well.

Advances in technology have enabled organisations to process more and more personal data, and to share information more easily. This has obvious benefits if they are collecting and sharing personal data in accordance with the data protection principles, but it also gives rise to equally obvious security risks. The more databases that are set up and the more information is exchanged, the greater the risk that the information will be lost, corrupted or misused.

In the introduction reference was made to two data security breaches, both of which caused the organisations involved significant embarrassment; put the Data Subjects at significant risk of identity theft and both resulted in significant fines.

What needs to be protected by information security arrangements?

The Act does not define “appropriate”. But it does say that an assessment of the appropriate security measures in a particular case should consider technological developments and the costs involved.

The Act does not require you to have state-of-the-art security technology to protect

the personal data you hold, but you should regularly review your security arrangements as technology advances. As we have said, there is no “one size fits all” solution to information security, and the level of security you choose should depend on the risks to your Law Centre.

What kind of security measures might be appropriate?

The Act does not define the security measures you should have in place. However, particular security requirements that apply within particular industries may impose certain standards or require specific measures. In general terms, which security measures are appropriate will depend on your circumstances, but there are several areas you should focus on. Physical and technological security is likely to be essential, but is unlikely to be sufficient by itself. Management and organisational security measures are likely to be equally important in protecting personal data.

Management and organisational measures

Carrying out an information risk assessment is an example of an organisational security measure, but you will probably need other management and organisational measures as well. You should aim to build a culture of security and awareness within your Law Centre.

Perhaps, most importantly, it is good practice to identify a person in your Law Centre with day-to-day responsibility for security measures. They should have the necessary authority and resources to fulfil this responsibility effectively.

Unless there is clear accountability in your Law Centre for such security measures, they will probably be overlooked and your centre’s overall security will quickly become flawed and out of date.

Every Law Centre needs a formal Information Security Policy and it is essential that there is clarity about related matters such as the following:

- Co-ordination between key people in the centre (for example, the person responsible for data security will need to know about commissioning and disposing of any IT equipment)
- Access to premises or equipment given to anyone outside the centre (for example, for computer maintenance) and the additional security considerations this will generate
- Business continuity arrangements that identify how to protect and recover any personal data the centre holds; and
- Periodic checks to ensure that the centre’s security measures remain appropriate and up to date

Staff

It is vital that staff understand the importance of protecting personal data; that they are familiar with the Law Centre's information security policy and know to put security procedures into practice.

Appropriate initial and refresher training must be provided and this should cover:

- Your Law Centre's duties under the Act and Standard Contract and restrictions on the use of personal data;
- The responsibilities of individual staff members for protecting Personal Data, including the possibility that they may commit criminal offences if they deliberately try to access, or to disclose, information without authority;
- The proper procedures to use to identify callers;
- The dangers of people trying to obtain Personal Data by deception (for example, by pretending to be the person whom the information is about or by making "phishing" attacks) or by persuading you to alter information when you should not do so; and
- Any restrictions your centre places on the personal use of its computers by staff (to avoid, for example, virus infection or spam).

The effectiveness of staff training relies on the individuals concerned being reliable in the first place. The Act requires you to take reasonable steps to ensure the reliability of any staff who have access to Personal Data.

Physical security

Technical security measures to protect computerised information are of obvious importance. However, many security incidents relate to the theft or loss of equipment, or to old computers or hard-copy records being abandoned.

Physical security includes things like the quality of doors and locks, and whether premises are protected by alarms, security lighting or CCTV. However, it also includes how you control access to premises, supervise visitors and volunteers, dispose of paper waste, and keep portable equipment secure.

What is the position when a Data Processor is involved?

Law Centres may use third party "data processors" to process personal data on their behalf. This often causes security problems. Particular care is needed because the Law Centre (and not the data processor) will be held responsible under the Data Protection Act for what the data processor does with the Personal Data.

The Act contains special provisions that apply in these circumstances. It says that, where you use a data processor:

- You must choose a data processor that provides sufficient guarantees about its security measures to protect the processing it will do for you
- You must take reasonable steps to check that those security measures are being put into practice; and
- There must be a written contract setting out what the data processor is allowed to do with the personal data. The contract must also require the data processor to take the same security measures you would have to take if you were processing the data yourself

Remember that costs draftsmen, agents, sub-contractors, locums, digital typing services etc. are all data processors and therefore you must ensure that you have appropriate contracts with them.

DATA SUBJECT RIGHTS

Principle 6: The rights of the Data Subject

“Personal data shall be processed in accordance with the rights of Data Subjects under this Act.”

What is an individual entitled to?

This Data Subject's main right, commonly referred to as subject access, is created by section 7 of the Act. It is most often used by individuals who want to see a copy of the information an organisation holds about them. However, the right of access goes further than this, and an individual who makes a written request and pays a fee is entitled to be:

- Told whether any personal data is being processed
- Given a description of the personal data, the reasons it is being processed, and whether it will be given to any other organisations or people
- Given a copy of the information comprising the data; and
- Given details of the source of the data (where this is available)

In most cases you must respond to a subject access request promptly and in any event **within 40 calendar days** of receiving it. However, some types of Personal Data are exempt from the right of subject access and so cannot be obtained by making a subject access request.

Under the right of subject access, an individual is entitled only to their own personal data, and not to information relating to other people (unless they are acting on behalf of that person). Neither are they entitled to information simply because they may be interested in it. So it is important to establish whether the information requested falls within the definition of personal data. In most cases, it will be obvious whether the information being requested is Personal Data.

Subject access provides a right to see the information contained in personal data, rather than a right to see the documents that include that information.

The Act specifies that a subject access request relates to the data held at the time the request was received. However, in many cases, routine use of the data may result in it being amended or even deleted while you are dealing with the request. So it would be reasonable for you to supply information you hold when you send out a response, even if this is different to that held when you received the request.

However, it is not acceptable to amend or delete the data if you would not otherwise have done so.

The Act also requires that the information you provide to the individual is in “intelligible form”. At its most basic, this means that the information you provide should be capable of being understood by the average person. However, the Act does not require you to ensure that the information is provided in a form that is intelligible to the particular individual making the request.

A Law Centre receiving a subject access request may charge a fee for dealing with it. The maximum fee you can charge is £10.

The Act does not prevent an individual making a subject access request via a third party. Often, this will be a solicitor acting on behalf of a client, but it could simply be that an individual feels comfortable allowing someone else to act for them. In these cases, you need to be satisfied that the third party making the request is entitled to act on behalf of the individual, but it is the third party’s responsibility to provide evidence of this entitlement. This might be a written authority to make the request or it might be a more general power of attorney.

What if there is information about other people?

Responding to a subject access request may involve providing information that relates both to the individual making the request and to another individual. The Act says you do not have to comply with the request if to do so would mean disclosing information about another individual who can be identified from that information, except where:

- The other individual has consented to the disclosure; or
- It is reasonable in all the circumstances to comply with the request without that individual’s consent.

So, although you may sometimes be able to disclose information relating to a third party, you need to decide whether it is appropriate to do so in each case. This decision will involve balancing the Data Subject’s right of access against the other individual’s rights in respect of their own personal data. If the other person consents to you disclosing the information about them, then it would be unreasonable not to do so. However, if there is no such consent, you must decide whether to disclose the information anyway.

The right to prevent processing likely to cause damage or distress

The Act also refers to the “right to prevent processing”. Although this may give the impression that an individual can simply demand that an organisation stops processing personal data about them, or stops processing it in a particular way, the right is often overstated. In practice, it is much more limited. An individual has a right to object to

processing only if it causes unwarranted and substantial damage or distress. If it does, they have the right to require an organisation to stop (or not to begin) the processing in question.

So, in certain limited circumstances, you must comply with such a requirement. In other circumstances, you must only explain to the individual why you do not have to do so.

An individual who wants to exercise this right has to put their objection in writing to you and state what they require you to do to avoid causing damage or distress. The Act limits the extent to which you must comply with such an objection, in the following ways:

- An individual can only object to you processing their own personal data;
- Processing an individual's personal data must be causing unwarranted and substantial damage or distress;
- The objection must specify why the processing has this effect.

In addition, an individual has no right to object to processing if:

- They have consented to the processing;
- The processing is necessary;
- In relation to a contract that the individual has entered into;
- Because the individual has asked for something to be done so they can enter into a contract;
- The processing is necessary because of a legal obligation that applies to you (other than a contractual obligation); or
- The processing is necessary to protect the individual's "vital interests".

What is meant by "damage or distress"?

The Act does not define what is meant by unwarranted and substantial damage or distress. However, in most cases:

- Substantial damage would be financial loss or physical harm; and
- Substantial distress would be a level of upset, or emotional or mental pain, that goes beyond annoyance or irritation, strong dislike, or a feeling that the processing is morally abhorrent.

Correcting inaccurate personal data

The fourth data protection principle requires personal data to be accurate. Where it is inaccurate, the individual concerned has a right to apply to the court for an order to rectify, block, erase or destroy the inaccurate information. In addition, where an individual has suffered damage in circumstances that would result in compensation being awarded and there is a substantial risk of another breach, then the court may make a similar order in respect of the personal data in question.

It may be impractical to check the accuracy of personal data someone else provides. In recognition of this, the Act says that, even if you are holding inaccurate personal data, you will not be considered to have breached the fourth data protection principle as long as:

- You have accurately recorded information provided by the individual concerned, or by another individual or organisation;
- You have taken reasonable steps in the circumstances to ensure the accuracy of the information; and
- If the individual has challenged the accuracy of the information, this is clear to those accessing it.

In these circumstances, the court may (as an alternative to ordering the rectification etc. of the inaccurate data) order that a statement of the true facts (in terms approved by the court) should be added to the record that contains it. And, if the court is not satisfied that you complied with the above requirements, it may order you to do so.

This right also applies to Personal Data that contains an expression of opinion based on inaccurate personal data.

Compensation

If an individual suffers damage because you have breached the Act, they are entitled to claim compensation from you. This right can only be enforced through the courts. The Act allows you to defend a claim for compensation on the basis that you took all reasonable care in the circumstances to avoid the breach.

In many cases, a breach of the Act will not cause an individual financial loss, but it may be distressing to find that personal data has been processed improperly. If an individual has suffered damage, any compensation awarded may take into account the level of any associated distress, but distress alone will not usually be sufficient to entitle an individual to compensation (unless the processing was for the purposes of journalism, literature or art).

There are no guidelines about levels of compensation in this area. Often, the parties can reach agreement about the amount of compensation which is appropriate. If they cannot agree, the court will have to decide. If an individual claims a certain amount in

compensation, they will need to be able to show how your failure to comply with the Act has resulted in their incurring that amount of loss or damage.

You can obviously defend a claim if you have not breached the Act. If there has been a breach, you can still defend a claim for compensation, but only if you can show that you took such care as was reasonably required in the circumstances to comply with the Act. What you will have to prove will depend on the nature of the breach in question. What is reasonable will depend on the circumstances.

In data protection terms, this means that you have looked at the way you process and protect personal data and that you put in place appropriate checks to prevent any problems occurring. Your defence may rely on describing these checks. Some form of positive action is often necessary and, if a reasonable step or precaution has not been taken, then the defence is likely to fail.

APPENDIX D - INFORMATION AUDIT FORM

INFORMATION AUDIT FORM		
Centre Name:		
Completed by:		
Audit Date		
Information / Data	How is it processed and where is it stored?	Why is it processed?

APPENDIX E - INFORMATION RISK ASSESSMENT FORM

Risk	Likelihood	Impact	Mitigation
Data Type:			
Processing Type:			

APPENDIX F - SAMPLE DOCUMENT RETENTION AND DESTRUCTION POLICY

This policy sets out how long information will normally be held at [insert name] Law Centre and when that information will be confidentially destroyed.

Records which should be kept should be securely stored and/or archived [in accordance with our archiving procedure²].

All information must be reviewed before destruction to determine if there are special factors (recent litigation, complaints or ongoing cases) which mean that destruction should be delayed.

Hard copy and electronically held documents and information must be deleted at the end of the retention period [in accordance with our document destruction procedure³].

[insert name] is responsible for implementing our Document Retention and Destruction Policy and for monitoring compliance. [he/she] undertakes an annual review of the policy to verify it is in effective operation.

Client Information	
Information	Retention Period
Client Case Files	6 years after the last activity on the file (typically payment of bill, closure and archive). For clients under the age of 18 the file should be kept for 6 years after the client has turned 18.
Client Enquiry Forms	18 months (unless a full client file was opened in which case in line with that file)
AdviceLine Sheets	18 months (unless a full client file was opened in which case in line with that file)
Client Complaints	6 years (with client file)

² A sample archiving procedure is available as part of the quality manual section of this toolkit.

³ A sample document destruction procedure is also available as part of the quality manual section of this toolkit.

Staff Information	
Information	Retention Period
Application forms/interview notes for unsuccessful candidates	12 months
Offer letters and acceptance	Permanently
Disciplinary, working time and training	6 years after employment ceases
Redundancy details	6 years from date of redundancy
Documents proving the right to work in the UK	Two years after employment ceases
Health and safety consultations	Permanently
PAYE Records	4 years
Workplace accidents	3 years after date of last entry. There are specific rules on recording incidents involving hazardous substances.
Payroll	3 years after the end of the tax year they relate to
Statutory maternity, adoption and paternity pay	3 years after the end of the tax year they relate to
Statutory sick pay	3 years after the end of the tax year they relate to
Working time arrangements	2 years from date on which they were made

Trustee Information	
Information	Retention Period
Details of Trustees, Directors and Management Committee Members.	6 years after they cease to be members
Board Meeting / Management Committee Meeting Agendas, Reports and Minutes	Permanently for historical purposes
Constitutional documents, Resolutions and Special Resolutions	Permanently
Business Plans	3 years

APPENDIX G - SAMPLE DATA PROTECTION POLICY

We are fully committed to compliance with the requirements of the Data Protection Act 1998 ('the Act').

The first requirement is registration under the Act. It is the responsibility of [insert name] to ensure that:

- The Law Centre is registered with the Information Commissioner's Office for all necessary activities under the Act;
- There is a process of continual review to determine whether any changes in the Law Centre's registration are required as a result of changes in the nature of the business;
- The details of the Law Centre as registered are kept up to date;
- The notification to the Information Commissioner's Office is renewed annually;
- The Law Centre maintains and updates the public Data Protection Register which will be reviewed regularly and at least on an annual basis;
- The Law Centre maintains this policy.

The second aspect of compliance is the observance of the principles which underline the Act, namely that all data which is covered by the Act (which includes not only computer data but also personal data held within a filing system) is:

- Fairly and lawfully processed;
- Processed for limited purposes;
- Adequate, relevant and not excessive;
- Accurate;
- Not kept longer than necessary;
- Processed in accordance with the Data Subject's rights;
- Secure;
- Not transferred to countries without adequate protection.

A further layer of compliance is that there are a number of codes of practice provided under the Act, which the Law Centre will observe. These may be altered or added to by the Information Commissioner, who is responsible for the administration of the Act.

All members of staff and volunteers are provided with training on Data Protection compliance on induction and as necessary from time to time. Additional training on any changes to this policy and refresher training will be provided annually.

Any member of our staff or volunteer with an enquiry about the handling and processing of personal data should approach [insert name] who is responsible for data protection in our Law Centre.

Each staff member or volunteer is responsible for ensuring that no breaches of this policy result from their actions. Failure to comply with this policy by any member of staff or volunteer will result in disciplinary proceedings.

Each staff member or volunteer is responsible for reporting any breach, or suspected breach of this policy.

[insert name] is responsible for implementing our Data Protection Policy and for monitoring compliance. he/she undertakes an annual review of the policy to verify it is in effective operation .

APPENDIX H - SAMPLE INFORMATION SECURITY & RISK MANAGEMENT POLICIES

Information Security Policy

The information we hold is both extremely sensitive and valuable. If this information is mismanaged there could be serious repercussions for clients, other individuals as well as for the Law Centre.

Further detail on the information we hold and the methods used to ensure its protection and security is set out in our Information Risk Management Policy.

Our policy is to protect the information we hold from all threats, whether internal, external, deliberate or accidental.

It is our policy to ensure that:

- Information is protected against unauthorised access;
- Information is kept confidential;
- The integrity of information we hold is maintained;
- Regulatory and legislative requirements are met;
- All breaches of information security, actual or suspected are reported and investigated; and
- Organisation and individual requirements for the availability of information and information systems are met.

We maintain the security and confidentiality of the information we hold as well as our information systems and applications by:

- Ensuring that all staff are aware of and fully comply with all relevant UK and European legislation including, but not limited to,:
 - the Data Protection Act 1998;
 - the Data Protection (Processing of Sensitive Personal Data) Order 2000;
 - The Copyright, Designs and Patents Act 1988;
 - The Computer Misuse Act 1990;
 - Regulation of Investigatory Powers Act 2000;
 - Freedom of Information Act 2000

- Having a consistent approach to security by ensuring that all staff are aware of the information security policies and procedures applicable in their work area and fully understand their own responsibilities;
- Creating and maintaining within our Law Centre a level of awareness of the need for Information Security and Data Management as an integral part of the day to day running of the Law Centre;
- Having in place up to date contingency and recovery plans;
- Having in place measures to ensure data is secured against loss and unauthorised access;
- Protecting the information assets under our control.

Compliance & Incidence Management

All staff must comply with information security procedures including the maintenance of data confidentiality and data integrity. They are also responsible for the operational security of any information systems they use including our case management system.

All staff are provided with training on this policy and security procedures during their induction. Additional training on any changes to this policy and any refresher training is provided annually.

Each staff member is responsible for ensuring that no breaches of this policy result from their actions. Failure to comply with this policy by any member of staff will invoke our Disciplinary Procedure and may result in disciplinary proceedings.

Any actual or suspected breaches (or the risk of such a breach) in information or data security shall immediately be reported to [insert name]. He/She will, in respect of any breach, consider an appropriate incident management plan to include:

- Report the breach to the Law Centre Manager and, where appropriate, to the Chair of the Management Committee;
- Immediately invoking any necessary procedures to contain the breach and limit the adverse consequences;
- Assessing any risks associated with the breach to determine the gravity of the breach and whether it is a material breach of any appropriate legislation or regulations;
- When the breach has been contained, determining what other steps need to be done;
- Notification to all relevant individuals and bodies such as the Information Commissioner's Office, regulatory bodies or other third parties such as the police or banks;
- Evaluating the causes of the breach and ensuring that any unsatisfactory procedures are corrected.

[insert name] is responsible for implementing our Information Security Policy and for monitoring compliance. he/she undertakes an annual review of the policy to verify it is in effective operation.

Information Risk Management Policy

An assessment of all risks is made annually by [insert name] for all information held by us and to ensure that appropriate procedures are in place to mitigate the risks.

The table below lists the key information assets we have identified for our Law Centre. Additionally, the table considers the risks to these assets, their likelihood and impact and how we ensure the protection and security of the assets.

Our Assets	Risk	Likelihood	Impact	Method of protection/security
Business/Service Plan	Low	Low	High	Access only with consent of [insert name(s)]. Backed up on external hard-drive.
Financial Information	Medium	Medium	High	All information kept by [insert name(s)]. Access only with [their][his][her] consent. Backed up on external hard-drive.
Accounts Information	Medium	Medium	High	All information kept by [insert name(s)]. Access only with [their][his][her] consent. Copies of accounts information held by external accountants. Backed up on external hard-drive.

Recruitment & Employment records including equality & diversity monitoring information	Medium	Medium	High	All information kept in [location] with access restricted to [insert name(s)].
Complaints Information	Low	Low	High	Complaints information kept in [location]. Access restricted to [insert name(s)].
Case management system	Low	Low	High	This system is backed up onto external hard-drives.
Original documentation held on behalf of clients	Medium	Medium	High	These documents are kept in the relevant client file and stored securely in locked cabinets.
Computers and IT	Medium	Medium	High	Computers are password protected and passwords are changed regularly. The use of memory sticks and other removable media is only used when there is a business case and all such data will be encrypted. New IT systems and upgrades are authorised by the [insert name] following an appropriate risk or impact assessment. The authorisation process takes into

				account our security requirements.
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Measures to ensure the adequate physical security of our premises that are used to store, process or access our information assets are considered in our [Business/Service Continuity Plan].

Specific measures which we have put in place to ensure the protection and security of all of our information assets include:

- Ensuring that all equipment is physically protected from threats and environmental hazards;
- Ensuring that only authorised persons who have a justified business need are given access to any restricted area containing information systems or stored data;
- Ensuring access controls are maintained at appropriate levels;
- Information will only be held only as long as is required, and disposed of in accordance with our Document Destruction Policy.

Guidance Note: *The sections below suggest some procedural steps to assist in the protection of data security. They may or may not be suitable for your Law Centre and should be adapted accordingly. Organisations should consult guidance issued by the Information Commissioner's Office and the Legal Aid Agency's Data Security requirements*

http://www.ico.gov.uk/for_organisations/data_protection/security_measures.aspx

<http://www.justice.gov.uk/downloads/legal-aid/civil-contracts/lsc-data-security-requirements-.pdf>

Computers & IT

All of our computers must be password protected and passwords are changed on a regular basis. Computers and other devices are to be locked whenever they are not in use.

All electronic data is securely backed up [at the end of each working day]. Records are maintained by [insert name] of all backup information including any failures or other issues. Backup media is encrypted and, where retained on-site prior to being sent for

remote storage is stored securely in a locked safe and at a sufficient distance away from the original data.

Anti-virus and anti-spyware is installed on all of our computers, laptops, servers and other electronic media and kept up to date by [insert name].

The disposal of any computers or electronic media is overseen by [insert name] to ensure that appropriate destruction methods are used.

Removable Media

We appreciate that there are large risks associated with the use of removable media (i.e. any medium which can be removed from the workstation including floppy discs and USB storage devices). The use of removable media devices is only approved if a valid business case for its use is developed. Requests for access to, and use of, removable media devices must be made in advance to [insert name].

Should access to, and use of, removable media devices be approved the following must be adhered to at all times:

- The only equipment and media used to connect to the Law Centre's equipment is that which has been purchased by the Law Centre and approved by [insert name].
- In all cases where the data/information to be held on the removable media device or laptop could be used to cause any individual damage or distress, in particular where it contains financial or medical information, the data/information must be encrypted before it will be permitted to leave our premises.
- Removable media should not be the only place where data is held. Copies of any data stored on removable media must also remain on the source system or computer.
- In order to minimise physical risk, loss, theft or electrical corruption, all removable storage media is stored in an appropriately secure and safe environment.
- All data copied to any removable media is deleted as soon as possible from that media.
- Each member of staff is responsible for the appropriate use and security of data in accordance with our Information Security Policy and our Information Risk Management Policy and for not allowing removable media devices, and the information stored on these devices, to be compromised in any way whilst in their care or under their control.

Third Parties

Third parties including barristers and clients or agents may not receive data or IT equipment without explicit agreement from [insert name]. Should third parties be allowed access to such information or systems then the Law Centre ensures that this policy is applied in full to their use, storage and transfer of the data.

Clear Desks Policy

Whenever desks are unoccupied for any extended period and at the end of each working day, all casefiles and other confidential information are removed from desks and securely locked away.

Transfer of data

Confidential or other data is not removed from our offices unless a valid business case for its use is developed. Requests for permission to remove data or other information are made in advance to [insert name]. Where information is permitted to be removed, all reasonable steps are taken to ensure that the integrity and the confidentiality of the information are maintained including:

- Keeping files and information in a secure and locked environment;
- Transporting files and information securely; and
- Not leaving files or information unattended in places where they are at risk (such as in cars, conference rooms or other public places).

In all cases, the terms of our [Confidentiality Policy] must be adhered to.

We conduct verification checks on all postal, DX, fax and email addresses before any information is sent to them. All sensitive or confidential information is encrypted before being sent by electronic means or sent by tracked DX or recorded delivery.

Compliance

All staff members are provided with training on this policy during their induction. Where appropriate, any specific information about security responsibilities is included within the relevant job descriptions.

Each staff member is responsible for ensuring that no breaches of this policy result from their actions. Failure to comply with this policy by any member of staff will invoke our Disciplinary Procedure and may result in disciplinary proceedings.

[insert name] is responsible for implementing our Information Risk Management Policy and for monitoring compliance. He/She undertakes an annual review of our information risk management policy to verify it is in effective operation.

Data Protection in 2016: The new General Data Protection Regulation; the new Police Directive; damage, interpretation and disapplication in *Vidal-Hall*; and police retention/disclosure cases in the UK

Stephen Cragg QC

Monckton Chambers

20 June 2016

General Data Protection Regulation 2016

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (in force 24.5.16, applies from 25.5.18)

Art 8 EU Charter of Fundamental Rights

- “1. Everyone has the right to the protection of personal data concerning them.*
- 2. The European Parliament and the Council...shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.”*

General Data Protection Regulations - objectives

1. Update EU data protection rules in line with technological developments
2. Enhance data protection rights for individuals

3. Modernise, simplify and harmonise regulation throughout the EU
 4. The need for tougher penalties and better powers of enforcement
 5. Extend regulation of data processing outside the EU
1. There is a need for modernisation and harmonisation. The current Directive (95/46/EC) - dates from 1995 (and was based on 1990 Commission proposal). There have been rapid technological developments and the scale of data sharing and collection has increased dramatically. Intelligent technology allows private and state use of personal data on an unprecedented scale. There is a wide variation in national implementation of Directive 95/46/EC, and a need to do away with legal uncertainty and current costly fragmentation.
 2. Some of the main articles in the Regulation are as follows: with reference to the Information Commissioner's Office guidance issued in March 2016: <https://ico.org.uk/media/for-organisations/documents/1624219/preparing-for-the-gdpr-12-steps.pdf> :-

Article 25: Data protection “by design” & “by default”

3. Proper systems in place to ensure that the right kind of data is collected and processed (or not), taking into account “the state of the art”, cost, inherent risks and scope, context and purpose of processing.

Article 17: The right to erasure (“Right to be forgotten”)

4. The right to have data erased when its retention and processing is no longer lawful or legitimate: the right described in the *Google Spain v Agencia Española de Protección de Datos* Case C-131/12

Article 8: Collecting information about children: need for parents' consent.

5. The first time this has been included. What the ICO says:

For the first time, the GDPR will bring in special protection for children's personal data, particularly in the context of commercial internet services such as social networking. In short, if your organisation collects information about children – in the UK this will probably be defined as anyone under 13 – then you will need a parent or guardian's consent in order to process their personal data lawfully. This could have significant implications if your organisation aims services at children and collects their personal data. Remember that consent has to be verifiable and that when collecting children's data your privacy notice must be written in language that children will understand.

Article 20 – The right to data portability

6. The right to be provided with the data held in a format which allows it to be transmitted directly to another controller if technically feasible. What the ICO says:-

The right to data portability is new. This is an enhanced form of subject access where you have to provide the data electronically and in a commonly used format. Many organisations will already provide the data in this way, but if you use paper print-outs or an unusual electronic format, now is a good time to revise your procedures and make any necessary changes.

Articles 77-83 – Remedies and liabilities

7. As well as the right to make a complaint to a supervisory authority, and a judicial remedy thereafter, there is also a right in Article 80 to mandate not-for-profit organisation to bring a case on your behalf. What the ICO says:-

The main rights for individuals under the GDPR will be:

- ☐ subject access,
- ☐ to have inaccuracies corrected,
- ☐ to have information erased,
- ☐ to prevent direct marketing,
- ☐ to prevent automated decision-making and profiling, and
- ☐ data portability.

On the whole, the rights individuals will enjoy under the GDPR are the same as those under the DPA but with some significant enhancements.

Articles 33-34 – Duty to notify a breach to a supervisory body

8. Within 72 hours of the breach. What the ICO says:-

...the GDPR will bring in a breach notification duty across the board. This will be new to many organisations. Not all breaches will have to be notified to the ICO – only ones where the individual is likely to suffer some form of damage, such as through identity theft or a confidentiality breach.

You should start now to make sure you have the right procedures in place to detect, report and investigate a personal data breach. This could involve assessing the types of data you hold and documenting which ones would fall within the notification requirement if there was a breach. In some cases you will have to notify the individuals whose data has been subject to the breach directly, for example where the breach might leave them open to financial loss. Larger organisations will need to develop policies and procedures for managing data breaches – whether at a central or local level. Note that a failure to report a breach when required to do so could result in a fine, as well as a fine for the breach itself.

9. Enforcement is further enhanced by increased responsibility and accountability and the need for data protection risk assessments (see the ICO's guidance <https://ico.org.uk/media/for-organisations/documents/1595/pia-code-of-practice.pdf> and the need for public authorities to employ data protection officers.

Police and Criminal Justice Data Protection Directive

10. The data protection reform package includes the General Data Protection Regulation and the Data Protection Directive for Police and Criminal Justice Authorities ("the Police Directive"): Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data.
11. The Police Directive replaces the current data protection rules that are based on the Framework Decision 2008/977/JHA for the police and criminal justice sector. The Police Directive seeks to regulate the use of personal data for law enforcement purposes, specifically "for the purposes of prevention,

investigation, detection or prosecution of criminal offences, the execution of criminal penalties or the safeguarding against and the prevention of threats to public security."

12. Member States have two years (to 2018) to apply the Data Protection Regulation and to transpose and implement the "Police Directive".

13. Whilst trumpeting the rights to data protection for individuals (enshrined in Article 8 of the Human Rights Charter), the new Police Directive is also heralded for allowing for smoother exchange of information between Member States' police and judicial authorities. Criminal law enforcement authorities will no longer have to apply different sets of data protection rules according to the origin of the personal data. EU countries may set higher standards than those enshrined in the directive if they so wish.

14. As the EU FAQ section says:-

This will save time and money and increase the efficiency in the fight against crime. Having more harmonised laws in all EU Member States will make it easier for our police forces to work together... improving cooperation in the fight against terrorism and other serious crime in Europe It establishes a comprehensive framework to ensure a high level of data protection whilst taking into account the specific nature of the police and criminal justice field.

15. Critics of the new regime argue that, from the point of view of individuals, there are almost no improvements on the current legal situation, and object to the fact that the Directive fails to differentiate between suspects, witnesses, guilty parties and victims as regards the protection of their fundamental rights: presumably it is thought that witnesses and victims should have greater protection. It is argued that the opportunity for greater harmonisation to strengthen citizens' rights has not been taken, and that greater co-operation and information exchange between police authorities should not be introduced without greater cross-border data protection standards for individuals.

16. Although it is said that individuals' personal data will be better protected, the principles applied are already familiar to anyone working in this area. Thus, all personal data should be processed lawfully, fairly, and only for a specific purpose. All law enforcement processing in the Union must comply with the principles of necessity, proportionality and legality, with appropriate safeguards for the individuals. Supervision is to be ensured by independent national data protection authorities and effective judicial remedies must be provide.
17. Further concerns were expressed by the European Data Protection Supervisor who commented in October 2015 that:-

In substance, the EU legislator should ensure that:

1. None of the provisions of the Directive decreases the level of protection that is currently offered by EU law -particularly the 2008 Council Framework Decision- and by the instruments of the Council of Europe.
2. The essential components of data protection, laid down in Article 8 of the Charter of the Fundamental Rights of the Union, are respected and that exceptions fulfil the strict test of proportionality, as specified in *Digital Rights Ireland*. In this Opinion, we point particularly on the principle of purpose limitation, on the right to access of individuals to their personal data and on the control by independent data protection authorities¹
3. The essential components of data protection are included in the Directive and not left to the discretion of the Member States¹

18. The Directive also provides rules for the transfer of personal data by criminal law enforcement authorities outside the EU, to ensure that these transfers take place with an adequate level of data protection. The directive provides rules on personal data exchanges at national, European and international level.
19. The directive also complements recent agreements on a new Europol regulation and the directive establishing a system collecting flight passenger data in the EU (EU PNR) by setting high, uniform standards on data transfers for law enforcement purposes. The Directive will cover the use of personal data for law enforcement purposes not just by the police. Other public organisations tasked

¹ Opinion 6/2015

with tackling crime, including local authorities with statutory prosecutorial functions will also be covered.

20. The position in the UK is complicated because the UK government has an opt-out in respect of the application of European data protection legislation in relation to domestic law enforcement. Due to the UK and Ireland's special status regarding Justice and Home Affairs legislation, the directive's provisions will only apply in these countries to a limited extent, that is only in the areas where the UK and Ireland have “opted in” to other laws on police and judicial cooperation. Outside of these areas, UK and Ireland will not be bound by the directive.
21. In practice, the UK will be bound by the Directive, when adopted, to permit the sharing of personal data for law enforcement purposes with other member states. However, the opt out applies to the Directive as it affects processing of personal data for law enforcement purposes in the UK itself.
22. The government’s keenness to retain control of sovereignty over criminal justice issues means that a revocation of the opt out is unlikely. Other options to fill the gap have been suggested such as extending the GDPR to cover domestic law enforcement issues, or the consideration of new data protection legislation to cover criminal justice issues. There is the potential that public bodies using data for criminal justice/law enforcement purposes could be governed by three different regimes, depending on whether the data is covered by the GDPR, domestic law enforcement provisions, or the Directive (so far as sharing information with other members and beyond is concerned).

Vidal- Hall v Google

23. In *Vidal-Hall v Google* [2015] 3 WLR 409, CA the lead claimant, along with two others, was pursuing claims that Google, through its use of internet ‘cookies’, misused her private information, breached her confidence and infringed the Data Protection Act 1998 (DPA 1998).

24. The claimants complained that Google collected private information about their internet usage (the Browser-Generated Information - "BGI") via the Apple Safari browser, and without their knowledge and consent, by means of cookies. The cookies were small programmes which allowed Google to identify and categorise information generated by the claimants' use of their Apple Safari internet browsers, and subsequently target advertising based on the claimants' browser use.
25. This revealed private information about the claimants, which was or might have been seen by third parties. This was also contrary to Google's stated position that such activity could not be conducted for Safari users unless they had expressly allowed it to happen. The claimants' claims concerned the internet usage period between summer 2011 and spring 2012. None of the Claimants alleged any pecuniary loss or other material damage (not even nominal damages). Their claims were for damages or compensation for distress.
26. The case raised issues as to the meaning of "damage" in section 13 of the DPA 1998, in particular, whether there can be a claim for compensation without pecuniary loss. Section 13(2) DPA 1998 makes it clear that compensation can only be awarded for distress caused by a contravention of the DPA 1998 where an individual has also suffered other damage or where the contravention relates to the processing of personal data for the "special purposes" (as listed under the DPA 1998).
27. The DPA 1998 was intended to implement Directive 95/46/EC 'on the protection of individuals with regard to the processing of personal data and on the free movement of such data'.
28. A number of articles in the Directive emphasise the importance of protecting *"the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data"* (see Article 1).
29. Article 23 states that:-

Member states *shall provide that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible*

with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered.

30. In *Vidal-Hall* the claimants accepted that they had been caused no other damage other than distress by the contravention of the DPA (not even to justify the award of nominal damages). It was also accepted that a literal interpretation of s13 DPA must exclude them from compensation under the DPA, as they had suffered no pecuniary loss, and they did not come within exceptions in s13(2) DPA 1998.

31. The issues were considered thereafter by the Court of Appeal as follows:-

Does “damage” in article 23 include non-pecuniary loss?

32. As the DPA 1998 is designed to transpose the Directive, the question arose as to whether ‘damage’ in article 23 of the Directive included non-pecuniary loss. Google submitted that it did not. In support they cited Rosemary Jay “Data Protection Law and Practice”²:-

...There is no reference to moral damages in the Directive. Article 23 provides that member states shall provide that any person who suffers damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered. There is no presumption in EU law that the term ‘damages’ includes moral damages. Nothing in the recital to the Directive refers to moral damage.it can be strongly argued that there is no such obligation as long as the domestic legal system provides an effective set of remedies. Moreover the fact that awards can be made for distress (the moral damage equivalent) where the breach involves the literary, journalistic or artistic purposes would argue that any reputational damage is likely to be covered.”

² 4th edition, 2012, para 14-34.

33. Also cited was the Irish case of *Collins v FBD Insurance plc*³, where Feeney J commented that s13(2) of the DPA 1998, when providing for damages for distress in some circumstances, “goes beyond the requirements in the Directive.

34. However, the Court reached the opposite conclusion, taking the following steps in its reasoning:-

(a) The Court noted the principle of EU law that legal terms have an autonomous meaning which will not necessarily accord with their interpretation in domestic law (paragraph 72).

(b) The Court referred to the case *Leitner v TUI Deutschland GmbH & Co K*⁴ when considering the meaning of “damage”, where Directive 90/314/EEC on package travel was engaged. The Advocate General in that case noted that where “damage” was used in a Directive without any restrictive connotation, then “the concept should be interpreted widely”. The ECJ itself found that as “compensation for non-material damage arising from the loss of enjoyment of a holiday is of particular importance to consumers”, then that was important to the way “damage” in that Directive should be interpreted.

(c) The Court of Appeal thus took the same approach to the construction of “damage” in article 23 of the Directive 95/46/EC (paragraph 76). Importantly, the court concluded that:-

Since what the Directive purports to protect is privacy rather than economic rights, it would be strange if it could not compensate individuals whose data privacy had been invaded so as to cause emotional distress (but not pecuniary damage). It is the distressing invasion of privacy which must be taken to be the primary form of damage (commonly referred to in the European context as ‘moral damage’) and the data subject should have an effective remedy (paragraph 77).

³ [2013] IEHC 137

⁴ (case C-168/00) [2002] All ER (EC) 561

(d) The Court also decided that it was irrational to treat EU data protection law as permitting a more restrictive approach to the recovery of damages than is available under article 8 of the ECHR: the object of the Directive⁵ was to ensure that data-processing systems protect and respect the fundamental rights and freedoms of individuals. The enforcement of privacy rights under article 8 of the ECHR has always permitted recovery of non-pecuniary loss.⁶

(e) The Court also considered article 8 of the Charter of Fundamental Rights⁷, and commented that:-

It would be strange if that fundamental right could be breached with relative impunity by a data controller, save in those rare cases where the data subject had suffered pecuniary loss as a result of the breach. It is most unlikely that the member states intended such a result (paragraph 78)

(f) On that basis the court concluded that article 23 of the Directive does not distinguish between pecuniary and non-pecuniary damage. To make the distinction “would substantially undermine the objective of the Directive which is to protect the right to privacy of individuals with respect to the processing of their personal data”. The Court even rejected a suggestion by Ms Vidal-Hall’s counsel that non-pecuniary damage should only extend to cases where there was also a breach of Article 8 of the ECHR.

The construction of section 13(2) of the 1998 Act

35. So what to do about the literal construction of section 13(2) of the DPA which, on the Court’s finding on the meaning of “damage”, failed to transpose Article 23?

36. The Court considered whether it was possible to “interpret section 13(2) in a way which was compatible with article 23 so as to permit the award of compensation for distress even in circumstances which do not satisfy the

⁵ Recitals (2), (7), (10) and (11) and Article 1 were especially referred to: all emphasise the right to privacy.

⁶ Although not always awarded: see for example the applicants in *S v UK* (2009) 48 EHRR 50 (the DNA case) were not awarded anything for the indefinite retention of their DNA samples and fingerprints.

⁷ “Everyone has the right to the protection of personal data concerning him or her.”

conditions set out in section 13(2) (a) or (b)". The claimants and defendant agreed it was not possible (although the Information Commissioner argued, unenthusiastically by the sounds of things, that it could).

37. The Court of Appeal took the following route:-

- (a) The *Marleasing* principle is that the courts of Member States should interpret national law enacted for the purpose of transposing an EU directive into its law, so far as possible, in light of the wording and the purpose of the directive in order to achieve the result sought by the directive, the critical words being 'so far as possible'.
- (b) If it is not possible to do this, even where it is clear that the legislation intended to implement the directive, the appropriate remedy for an aggrieved person is to claim *Francovich* damages against the state.
- (c) The court recognised a close parallel between the *Marleasing* principle and section 3 of the HRA,⁸ and "by analogy with the approach to section 3 of the HRA, the court cannot invoke the *Marleasing* principle to adopt a meaning which is 'inconsistent with a fundamental feature of the legislation'" (paragraph 83).
- (d) The jurisprudence of the Court of Justice recognises that when transposing a directive a Member State may choose not to implement it faithfully. The court considered it clear that Parliament had deliberately chosen to limit the right to compensation but was unable to ascertain why.
- (e) A number of interpretive "techniques" could be used to try to eliminate an incompatibility. These include reading words in, reading down, and even disapplying or striking down part of a measure. Whether any of these approaches can be used depended on "whether the change brought about by the interpretation alters a fundamental feature of the legislation or is inconsistent with its essential principles or goes against its grain, to use Lord Rodger's memorable phrase". (paragraph 90).

⁸ And cited R (IDT Card Services Ireland Ltd) v Customs and Excise Comrs [2006] STC 1252, para 92.

- (f) No one had suggested that the exclusion of distress in most circumstances was an oversight from section 13 DPA 1998, even though it had not been possible to determine why Parliament had excluded it. The Court decided that section 13 is a central feature of the DPA 1998 and section 13(2) is an important element of the compensation provisions that Parliament enacted. In view of the importance to the DPA scheme as a whole of the provisions for compensation, the limits set by Parliament in that regard are a fundamental feature of the legislation. (paragraph 93).
- (g) On that basis, whatever technique was used, the court decided that it could not, therefore, interpret section 13(2) compatibly with article 23.

Article 47 of the Charter of Fundamental Rights of the European Union

38. Article 47 of the Charter provides:-

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article’.

39. Article 7 of the Charter provides that ‘everyone has the right to respect of his or her private and family life, home and communications’, and as stated above article 8(1) of the Charter provides that ‘everyone has the right to the protection of personal data concerning him or her’. The claimants and the Information Commissioner argued that section 13(2) DPA 1998 should be disapplied on the grounds that it conflicts with the rights guaranteed by articles 7 and 8 of the Charter and the court accepted that submission.

40. The Court of Appeal explained its conclusion as follows:-

- (a) The approach in *Benkharbouche*⁹ was applicable. Thus:-

⁹ *Benkharbouche v Embassy of the Republic of Sudan* [2016] QB 347

- i. where there is a breach of a right afforded under EU law, article 47 of the Charter is engaged;
- ii. the right to an effective remedy for breach of EU law rights provided for by article 47 embodies a general principle of EU law;
- iii. in most cases, that general principle has horizontal effect;
- iv. in so far as a provision of national law conflicts with the requirement for an effective remedy in article 47, the domestic courts can and must disapply the conflicting provision; and
- v. the only exception to iv. is that the court may be required to apply a conflicting domestic provision where the court would otherwise have to redesign the fabric of the legislative scheme.

(b) The Court rejected Google's arguments against this approach, stating:-

- i. Article 8 is based on the Directive and therefore the claimants were not relying upon Charter rights to expand their EU rights (which the Court accepted would be impermissible).
- ii. Provisions in the DPA 1998 for the Information Commissioner to serve an enforcement notice and/or impose a monetary penalty, cannot make good the failure of s13(2) to provide, in most cases, for compensation for distress.
- iii. The reliance on *R (Chester) v Secretary of State for Justice*,¹⁰ to prevent the court disapplying a carefully calibrated Parliamentary choice, was misplaced.

(c) In relation to the last point, the defendants relied upon the rejection by Lord Mance in the Supreme Court in *Chester* that it should disapply the whole of the

¹⁰ [2014] AC 271.

legislative prohibition on prisoner voting, so as to make all prisoners eligible to vote in order, (as that was not what was required to comply with EU law). The Supreme Court said also that it could not interpret the relevant legislation compatibly because that would entail devising a scheme allowing some prisoners to vote and that was quintessentially a matter for Parliament. However, the Court of Appeal noted that:-

It is implicit in Lord Mance JSC's reasoning that, if EU law did not permit any prohibition on prisoner voting, the proper course would have been to disapply the relevant legislation (paragraph 103).

(d) The Court of Appeal decided that, as in *Benkharbouche*, the scope of the disapplication was clear:-

What is required in order to make section 13(2) compatible with EU law is the disapplication of section 13(2), no more and no less. The consequence of this would be that compensation would be recoverable under section 13(1) for *any* damage suffered as a result of a contravention by a data controller of any of the requirements of the DPA. No legislative choices have to be made by the court.

41. Thus the Court of Appeal completed a fancy piece of footwork. S13(2) was a fundamental aspect of the DPA, such that it was not possible use interpretive techniques to make it comply with Article 23. But that did not prevent the Court disapplying s13(2) completely to comply with Article 47, because the disapplication was of a self-contained aspect of the DPA 1998.

Appeal to the Supreme Court

42. Google has been granted permission to appeal to the Supreme Court on the following grounds:

Whether the Court of Appeal was right to hold that section 13(2) of the Data Protection Act 1998 was incompatible with Article 23 of the Directive.

Whether the Court of Appeal was right to disapply section 13(2) of the Data Protection Act 1998 on the grounds that it conflicts with the rights guaranteed by Articles 7 and 8 of the EU Charter of Fundamental Rights.

43. The case raises an interesting issue in relation to cases which engage fundamental rights under both the ECHR and the Charter. The practical effect of the Court's conclusion is to grant a claimant potentially stronger remedies under EU law for human rights breaches: disapplication of primary legislation, rather than a mere declaration of incompatibility under s.4 of the Human Rights Act 1998.

The police and data protection/use in the UK – 2008 -2016

44. There has been a series of cases over the last eight or nine years focussing on police powers in the UK to retain, disclose or otherwise use personal information and citing both ECHR and EU law.

S v UK (2008) 48 EHRR 1169

45. Indefinite retention of DNA samples and fingerprints was a breach of Article 8, said the Grand Chamber. Given the nature of personal information contained in cellular samples, their retention per se had to be regarded as interfering with the right to respect for the private lives of the individuals concerned.
46. The Court said that retention had a clear basis in domestic law and pursued a legitimate aim. However, it failed to achieve a fair balance between the respective public and private interests.

119 In this respect, the Court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales. The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; ...The retention is not time limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the materials destroyed ; in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances.

47. A particular concern was the risk of stigmatisation, in that innocent individuals were treated in the same way as convicted persons, which raised an issue as to their perception of the presumption of innocence.

R (L) v Metropolitan Police Commissioner [2010] 1 AC 410

48. L had been employed as an assistant at a school, supervising children in the lunchtime break. An ECRC was disclosed that her son had been placed on the child protection register under the category of neglect, she being alleged to have failed to exercise the requisite degree of care and supervision. As a result, L lost her job. She sought the quashing of the police decision to disclose the information together with a declaration that the relevant statutory provisions were incompatible with her article 8 rights.

49. The Court held that in forming the opinion on relevance, the police had to consider, whether the information "ought" to be included in the ECRC. The police had therefore to consider in every case whether there was likely to be an interference with the applicant's private life, and if so whether that interference could be justified. The issue was essentially one of proportionality. On the one hand there was a pressing social need that children and vulnerable adults should be protected against the risk of harm; on the other there was the applicant's right to respect for her private life. The correct approach was that neither consideration had precedence over the other. Lord Hope at para 27:-

.....information about an applicant's convictions which is collected and stored in central records can fall within the scope of private life within the meaning of article 8(1), with the result that it will interfere with the applicant's private life when it is released. It is, in one sense, public information because the convictions took place in public. But the systematic storing of this information in central records means that it is available for disclosure under [Part V](#) of the 1997 Act long after the event when everyone other than the person concerned is likely to have forgotten about it. As it recedes into the past, it becomes a part of the person's private life which must be respected. Moreover, much of the other information that may find its way into an ECRC relates to things that happen behind closed doors.It may even disclose something that

could not be described as criminal behaviour at all. The information that was disclosed on the appellant's ECRC was of that kind.

R (GC) v Commissioner of the Police for the Metropolis [2011] 1 WLR 1230

50. Two appellants who had been arrested and not convicted claimed that their DNA samples and fingerprints had been retained by the police indefinitely under a policy promulgated by ACPO which the House of Lords in 2004 held was lawful : *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196, but which the Grand Chamber of the ECtHR decided in December 2008 was a blanket and indiscriminate policy which amounted to a breach of Article 8 ECHR: *S and Marper v United Kingdom* (2008) 48 EHRR 1169.

51. A seven member panel of the Supreme Court decided that it should follow the Grand Chamber's approach and that it should depart from the House of Lords decision. Thus, the indefinite retention of the claimants' data was an unjustified interference with their rights under article 8 of the Convention.

R (on the application of C) v Metropolitan Police Commissioner [2012] EWHC 1681 (Admin) [2012] 1 WLR 3007

52. The Divisional Court decided that it was disproportionate for the Metropolitan Police to retain photographs taken on arrest in the police station for long periods of time (at least six years before a review) in cases where the individual was subsequently not charged and/or not convicted of any offence.

53. The Force said that it was applying a Code of Practice and guidance drawn up by Home Office for the management of information by the police. But the Court declared that approach was incompatible with the Claimants' rights to respect for private life pursuant to Article 8 of the European Convention of Human Rights. It did not order that the photographs be destroyed on the basis that the Force said it was revising the policy, but the Court made it clear that a new policy would be expected within months rather than years. (New policy still awaited!)

54. The Biometrics Commissioner (who oversees the use of DNA samples and fingerprints but not photographs) has recently expressed wide-ranging concerns about the retention of photographs on the national database, the total lack of regulation that applies, and the decision of the police to introduce upload photographs to the database without further public debate or national consultation. www.gov.uk/government/publications/biometrics-commissioner-annual-report-2013-2014

R (T) v Chief Constable of Greater Manchester and R (B) v Secretary of State for the Home Department [2014] UKSC 35. [2014] 3 WLR 96.

55. The Supreme Court upheld the Court of Appeal's conclusions that the obligation to disclose all cautions for the purposes of criminal records checks, as set out in Part V of the Police Act 1997 was incompatible with Article 8 rights to respect for private life, as were the disclosure provisions in the Rehabilitation of Offenders Order 1975.

56. The Supreme Court had little trouble finding that the relevant provisions interfered with T's and B's Article 8 ECHR rights and had "*significantly jeopardised entry into their chosen field of endeavour*".

57. In relation to the disclosure of data relating to T's and B's cautions under the 1997 Act, the majority of the UKSC took the view that the interference was not "*in accordance with the law*" within the meaning of Article 8(2) ECHR, and was therefore unlawful. The reasoning in this regard appears in the judgment of Lord Reed. Relying on the case of *MM v UK* (App. No. 24029/07), which concerned the disclosure of an individual's conviction for child abduction pursuant to a version of the 1997 Act which was materially identical to that considered in the case of T and B, he held: "...*That judgment establishes, in my opinion persuasively, that the legislation fails to meet the requirements for disclosure to constitute an interference "in accordance with the law"*".

58. There was unanimity amongst the judges that the interference with T's and B's Article 8 ECHR rights arising from both the 1997 Act and the 1975 Order was not necessary in a democratic society, and therefore unjustified. Lord Wilson considered that the legislative provisions served the "*supremely important*" objective of protecting various members of society, particularly vulnerable groups. Nonetheless, it was noted that T's and B's criticism of the regime was "*obvious*". Of particular force was the point that the regime operated "*indiscriminately*". The Court concluded that the regime set up by the 1997 Act and the 1975 Order failed the requirement of necessity, going further than was necessary to accomplish the statutory objective, and failing to strike a fair balance between T's and B's rights and the interests of the community.

R (Catt), R (T) v Commissioner of Police of the Metropolis [2015] A.C. 1065

59. These were appeals to the Supreme Court by Mr Catt, 91, who complained about retention of information by the police about his presence at demonstrations where they had been violence (although not from him); and by T who objected to a policy of retention of an harassment warning by police for seven or twelve years. The Court of Appeal had decided that the actions of the police in both cases were disproportionate breaches of the right to respect for private life by the police

60. The Supreme Court decided Article 8 was engaged in both cases. The majority decided that given the context in Mr Catt's case, the interference with his Article 8 rights was minimal and that the retention was justified for the purposes of intelligence-gathering in relation to public order offences. Long periods of retention of harassment notices could not be justified in T's case, but as in fact the notice had been destroyed after 2 ½ years in her case, there was no breach of Article 8: retention for that period was justified in case there were repeated actions of harassment in that period.

Gaughran v Chief Constable of Northern Ireland [2015] UKSC 29

61. This case from Northern Ireland considered the proportionality of indefinite retention of DNA samples, profiles and other information including photographs and fingerprints, where a person has been convicted of a recordable offence. The appellant in the current case had been convicted of a drink driving offence in 2008.
62. The majority of the Supreme Court considered that it did not have to take the same approach as the Grand Chamber in *S v UK* (2009) 48 E.H.R.R. 50 in relation to the retention of biometric data of those who had not been convicted of an offence, when deciding whether there had been an unjustified breach of Article 8. The principles of proportionality whereby the Court in *S* had considered a number of factors (seriousness of the offence, age of the offender, time passed since offence committed) were not to be applied in the same way where a person had been convicted. It was noted that the retention scheme only applied to adults, and that the interference with the right to respect to private life would be small. There were considerable benefits to the police in retaining the information. Indefinite retention of the material was well within the margin of appreciation of the police in the circumstances.
63. Lord Kerr delivered a powerful dissent: he was firmly of the view that the *S v UK* approach should apply to convicted cases as well, and that a lawful system would require deletion of information when a conviction was deemed to be spent.

R (P & A) v Secretary State for Justice and others [2016] EWHC 89 (Admin)

64. The claimants challenged the amendments made to the criminal records disclosure scheme following the Supreme Court case of *R (T and B) v Chief Constable of Greater Manchester and others* [2015] AC 49. Amendments still contained provision for indefinite disclosure wherever a person had more than one conviction. Further, for certain professions similar changes were made to the rehabilitation of offenders legislation, but still exempted those with more than one conviction. Both the claimants had more than one conviction in the distant

past, for fairly minor matters. They sought declarations that the changes to the Police Act 1997 Part 5 and to the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 were incompatible with their right to respect for private life under Article 8 ECHR.

65. The Court found that the revised provisions did breach the claimants' Article 8 rights. The judgment concentrated on whether the revised scheme was "in accordance with the law" for the purposes of Article 8(2), rather than whether the scheme was justified and proportionate for a legitimate aim. The Court noted that the Supreme Court decision in *T and B* had changed the understanding as to how the "in accordance with the law" requirement should be applied (the Supreme Court had found that the original scheme was not in accordance with the law as well as disproportionate). The test to be applied was whether the revised scheme protected against arbitrariness, and whether there were sufficient safeguards for persons such as the claimants. The Court said that a scheme which could catch both the claimants and require indefinite disclosure of their convictions did not meet these tests and so the revised scheme was not in accordance with the law.

NEWS

On Espionage in London

MI5 and MI6 spying on cartel to keep dirty money from entering the London Stock Exchange



COMMENTS

By [Jilly Beattie](#)

08:30, 16 FEB 2016



MI5 building in London (Image: Nick Ansell/PA Wire)

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Britain's top spies are investigating Dublin's gangland shootings, it has been claimed.

MI5 and MI6 agents are believed to be working together to unravel the lucrative businesses behind the brutality in a bid to

keep drugs and dirty money out of the UK capital and beyond.

They count the Kinahan gang – locked in a deadly feud with the Hutch crime mob – as the European equivalent of the Mexican cartels which have brought death and destruction on a huge scale on their own doorstep.


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The British spooks are believed to be under instruction to gather information to protect the London Stock Exchange from swallowing up dirty money and pouring seemingly legitimate cash back into the community.

Belfast Live understands MI5 contacted private investigators following the fatal shooting of David Byrne, 34, who was buried yesterday – and the retaliatory murder of Eddie Hutch, 59, in the city three days later.

Ireland's bloody drug feud attracted the attention of Whitehall where officials fear the impact of the massive Irish drugs business on the UK.

A source said: "We believe the Kinahan gang use Ireland as the gateway to European market. With Ireland as the backdoor, Scotland and England are seen as the side doors and that creates a very major problem. The UK will do everything it can to protect themselves from infiltration but London's property market is very attractive for gangs who need to launder vast sums of money.

“The only difference between the IRA buying a sweet shop and getting a clean face to front it, and the drugs lords buying up million pound properties and businesses in London under the auspices of a clean company, is just scale. These people have taken what they learned and simply grown the business.”

LOADING

David Byrne was shot dead

Private investigators were recently hired by solicitors involved in London property sales to ensure they complied with money laundering legislation – but the PIs found alleged links to the Kinahan gang and quickly backed off.

A source said: “MI5 and MI6 have been watching this gang for quite some time and when the shootings took place in Dublin, they reacted rapidly.

“Solicitors who had been seeking due diligence before property deals were sealed, hired investigators but they pulled out once they realised exactly who and what they were dealing with.

"MI5 are part of the European working group dealing with this gang, the biggest, most powerful, lucrative and ruthless drug cartel in Europe.

"The gangs work with the Mexicans, FARC in Colombia, other cartels in South America and ETA in Spain – and they've learned from them and Irish paramilitaries.

"The public needs to understand these gangs are not just peddling a few kilos of gear. These are clever, relentless and ruthless and deal globally in drugs.

"They run the businesses on corporate lines but the difference is if you disobey the boss or rival the business, you can expect a bullet in the head."

The Garda's Emergency Reaction Unit is already in place in Dublin, having been transferred from Co Louth where they had been based since October following the murder of Garda Tony Golden. Armed and highly-trained, they have been told to "expect the unexpected".

One said: "It's bad news. The Charlie Hebdo attacks were ruthless but we know right now that we when put our head around any corner in Dublin we could get it blown off with an AK47.

"We are up against a mighty enemy. They don't care who gets in their path."

Ireland and the machinations of the drug lords have been brought into sharp focus of teams of government-run specialists with headquarters outside Ireland.

Between them they specialise in anti-terror practises, Irish affairs, money laundering, firearms and surveillance.

A source said: "Heightened international co-operation started after 9/11 in America. It was enhanced after the 7/7 attacks. With the shooting in 2005 of Charles de Menezes in London, we had the first authorised executions on British soil by police – although it was later publicly denied.

"The information exchange and co-operation became even more slick in reaction to firstly al-Qaeda, then those known as IS. And after the last big attacks in Paris co-operation and liaison were streamlined further across the European nations.

"The Euro working groups communicate and train together and have experience of joint operations, with efficient debriefing of analysis and dissemination – and MI5 and MI6 are big players in counter-terror and organised crime.

"Where Dublin and the Kinahan gang are involved, they're right in there too. If gang activity risks reaching British soil and in particular the British economy, they act and in the UK they outrank any Special Branch consideration."

With Dublin in the grip of the brutal drugs gangs and the Gardai working to control the situation, it is now clear the gangs learned much of their trade from Ireland's paramilitaries.

One source said: "They watched and learned, then coupled learning with experience, and then experience with a relentless lust for money, violence and control. And now they're much more powerful and ruthless, better equipped and run than any paramilitary group.

"In the Irish underworld life is cheap and the steggings are ruthless and efficient. The attack on the hotel was well stegged, well planned with everything accounted for. This is not going to stop any time soon.

"So while the gangs plot their next move, MI5 and MI6 are watching everything, it will just be a matter of time before action will be taken.

"The gang think they're untouchable – we'll have to wait and see."

- **What is MI6 ? Made famous by the 007 James Bond movies, Britain's real-life MI6 agents work for the Secret Intelligence Service. They are responsible for collecting Britain's foreign intelligence and provide the government with a worldwide covert capability to promote and defend the UK's national security and economy.**
- What is MI5? MI5 is the UK's Security Service, made famous by James Bond's 007, is responsible for protecting the nation against threats to national security.

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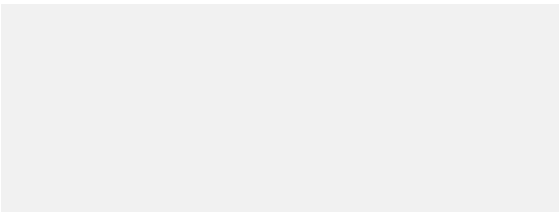
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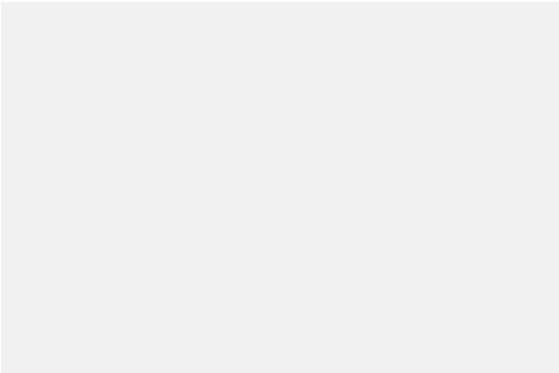
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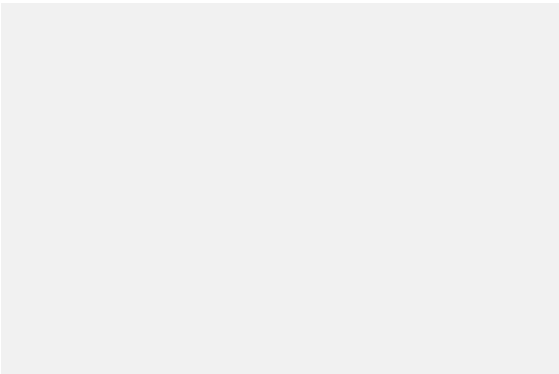
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Children's christmas presents stolen from under tree by housebreaker in East Belfast



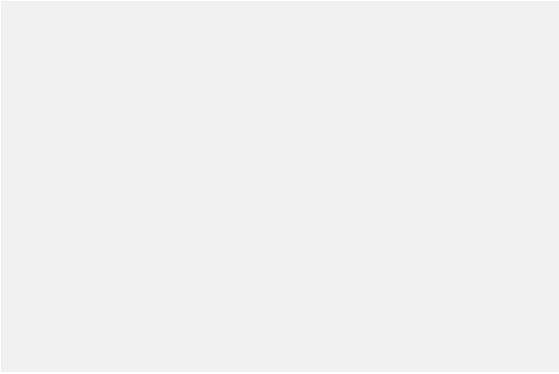
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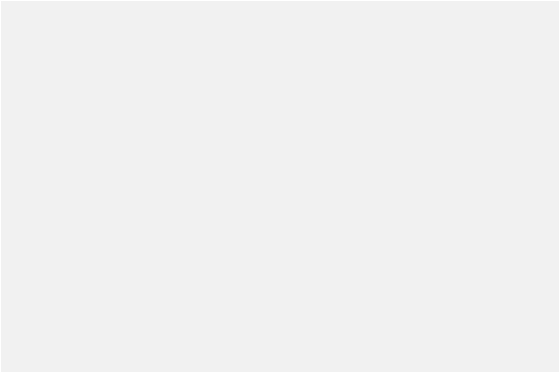
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Northern Ireland's Elf on the Shelf is naughtiest



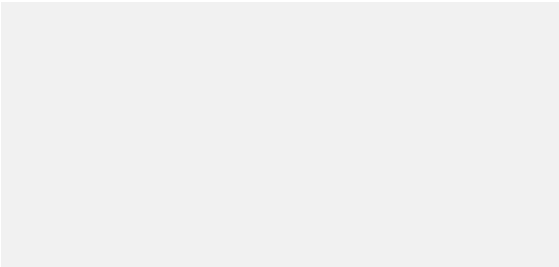
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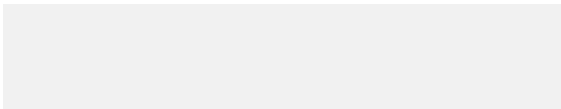
Gym boss drops into Children's Hospital with Christmas gifts for kids



F U N S T U F F

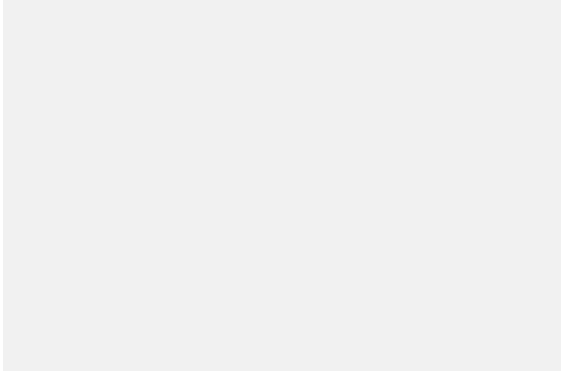
Happy Christmas! Santa is home safely after a long night delivering presents





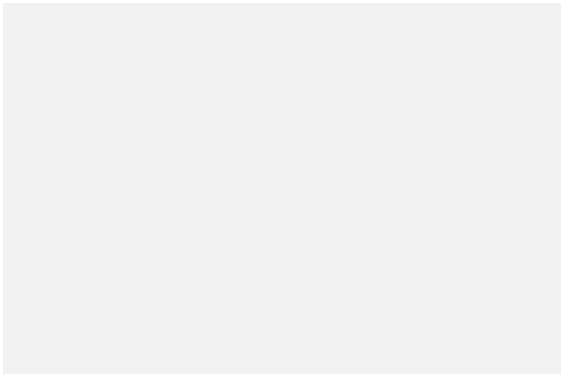
P S N I

Man suffers broken nose, swollen head and other facial injuries in nightclub dance floor assault



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Young people praised for protecting vulnerable girl on night out



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Model Complaint Form

For communications under:

- Optional Protocol to the International Covenant on Civil and Political Rights
 - Convention against Torture, or
- International Convention on the Elimination of Racial Discrimination

Please indicate which of the above procedures you are invoking:

Date:

I. Information on the complainant:

Name:

First name(s):

Nationality:

Date and place of birth:

Address for correspondence on this complaint:

Submitting the communication:

on his/her own behalf:

on behalf of another person:

If the complaint is being submitted on behalf of another person:

Please provide the following personal details of that other person

Name:

First name(s):

Nationality:

Date and place of birth:

Address or current whereabouts:

If you are acting with the knowledge and consent of that person, please provide that person's authorization for you to bring this complaint

Or

If you are not so authorized, please explain the nature of your relationship with that person: and detail why you consider it appropriate to bring this complaint on his or her behalf:

II. State concerned/Articles violated

Name of the State against which the complaint is directed:

.....

Articles of the Covenant or Convention alleged to have been violated:

.....

III. Exhaustion of domestic remedies/Application to other international procedures

Steps taken by or on behalf of the alleged victims to obtain redress within the State concerned for the alleged violation – detail which procedures have been pursued, including recourse to the courts and other public authorities, which claims you have made, at which times, and with which outcomes:

If you have not exhausted these remedies on the basis that their application would be unduly prolonged, that they would not be effective, that they are not available to you, or for any other reason, please explain your reasons in detail:

Have you submitted the same matter for examination under another procedure of international investigation or settlement (e.g. the Inter-American Commission on Human Rights, the European Court of Human Rights, or the African Commission on Human and Peoples' Rights)?

If so, detail which procedure(s) have been, or are being, pursued, which claims you have made, at which times, and with which outcomes:

IV. Facts of the complaint

Detail, in chronological order, the facts and circumstances of the alleged violations. Include all matters which may be relevant to the assessment and consideration of the particular case. Please explain how you consider that the facts and circumstances described violate your rights.

.....

.....

.....

Author's signature:

[The blanks under the various sections of this model communication simply indicate where your responses are required. You should take as much space as you need to set out your responses.]

V. Checklist of supporting documentation (copies, not originals, to be enclosed with your complaint):

- Written authorization to act (if you are bringing the complaint on behalf of another person and are not otherwise justifying the absence of specific authorization):
- Decisions of domestic courts and authorities on your claim (a copy of the relevant national legislation is also helpful):
- Complaints to and decisions by any other procedure of international investigation or settlement:
- Any documentation or other corroborating evidence you possess that substantiates your description in Part IV of the facts of your claim and/or your argument that the facts described amount to a violation of your rights:

Please include, if necessary, an indication in a UN language (Arabic, Chinese, English, Spanish, French and Russian) of the contents of the accompanying documentation.

Your communication should not exceed 50 pages (excluding annexes). In case your application exceeds twenty pages, you must also file a short summary.

European Convention on Human Rights



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE



as amended by Protocols Nos. 11
and 14

supplemented by Protocols Nos. 1, 4,
6, 7, 12 and 13

The text of the Convention is presented as amended by the provisions of Protocol No. 14 (CETS no. 194) as from its entry into force on 1 June 2010. The text of the Convention had previously been amended according to the provisions of Protocol No. 3 (ETS no. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS no. 55), which entered into force on 20 December 1971, and of Protocol No. 8 (ETS no. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS no. 44) which, in accordance with Article 5 § 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols were replaced by Protocol No. 11 (ETS no. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS no. 140), which entered into force on 1 October 1994, was repealed and Protocol No. 10 (ETS no. 146) lost its purpose.

The current state of signatures and ratifications of the Convention and its Protocols as well as the complete list of declarations and reservations are available at www.conventions.coe.int.

Only the English and French versions of the Convention are authentic.

European Court of Human Rights
Council of Europe
F-67075 Strasbourg cedex
www.echr.coe.int

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Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.1950

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

ARTICLE 1

Obligation to respect Human Rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I RIGHTS AND FREEDOMS

ARTICLE 2

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ARTICLE 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 4

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term "forced or compulsory labour" shall not include:
 - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
 - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
 - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - (d) any work or service which forms part of normal civic obligations.

ARTICLE 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

ARTICLE 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 7

No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and

in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11

Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

ARTICLE 12

Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

ARTICLE 13

Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

ARTICLE 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

ARTICLE 15

Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

ARTICLE 16

Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

ARTICLE 17

Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and

freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

ARTICLE 18

Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

SECTION II EUROPEAN COURT OF HUMAN RIGHTS

ARTICLE 19

Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

ARTICLE 20

Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

ARTICLE 21

Criteria for office

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
2. The judges shall sit on the Court in their individual capacity.
3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

ARTICLE 22

Election of judges

The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

ARTICLE 23

Terms of office and dismissal

1. The judges shall be elected for a period of nine years. They may not be re-elected.
2. The terms of office of judges shall expire when they reach the age of 70.
3. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

4. No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.

ARTICLE 24

Registry and rapporteurs

1. The Court shall have a Registry, the functions and organisation of which shall be laid down in the rules of the Court.
2. When sitting in a single-judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court's Registry.

ARTICLE 25

Plenary Court

The plenary Court shall

- (a) elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;
- (b) set up Chambers, constituted for a fixed period of time;
- (c) elect the Presidents of the Chambers of the Court; they may be re-elected;
- (d) adopt the rules of the Court;
- (e) elect the Registrar and one or more Deputy Registrars;
- (f) make any request under Article 26, paragraph 2.

ARTICLE 26

Single-judge formation, Committees, Chambers and Grand Chamber

1. To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in

Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.

2. At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.
3. When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.
4. There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.
5. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned.

ARTICLE 27

Competence of single judges

1. A single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination.
2. The decision shall be final.

3. If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination.

ARTICLE 28

Competence of Committees

1. In respect of an application submitted under Article 34, a committee may, by a unanimous vote,

(a) declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or

(b) declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.

2. Decisions and judgments under paragraph 1 shall be final.

3. If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1.(b).

ARTICLE 29

Decisions by Chambers on admissibility and merits

1. If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.

2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

ARTICLE 30

Relinquishment of jurisdiction to the Grand Chamber

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

ARTICLE 31

Powers of the Grand Chamber

The Grand Chamber shall

- (a) determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43;
- (b) decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46, paragraph 4; and
- (c) consider requests for advisory opinions submitted under Article 47.

ARTICLE 32

Jurisdiction of the Court

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

ARTICLE 33

Inter-State cases

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.

ARTICLE 34

Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

ARTICLE 35

Admissibility criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

2. The Court shall not deal with any application submitted under Article 34 that

(a) is anonymous; or

(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

ARTICLE 36

Third party intervention

1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who

is not the applicant to submit written comments or take part in hearings.

3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.

ARTICLE 37

Striking out applications

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

- (a) the applicant does not intend to pursue his application; or
- (b) the matter has been resolved; or
- (c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

ARTICLE 38

Examination of the case

The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.

ARTICLE 39

Friendly settlements

1. At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.

2. Proceedings conducted under paragraph 1 shall be confidential.

3. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

4. This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.

ARTICLE 40

Public hearings and access to documents

1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.

2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

ARTICLE 41

Just satisfaction

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

ARTICLE 42

Judgments of Chambers

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

ARTICLE 43

Referral to the Grand Chamber

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.
2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.
3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

ARTICLE 44

Final judgments

1. The judgment of the Grand Chamber shall be final.
2. The judgment of a Chamber shall become final
 - (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or
 - (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or
 - (c) when the panel of the Grand Chamber rejects the request to refer under Article 43.
3. The final judgment shall be published.

ARTICLE 45

Reasons for judgments and decisions

1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.
2. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

ARTICLE 46

Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two-thirds of the representatives entitled to sit on the committee.
4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.
5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of

paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

ARTICLE 47

Advisory opinions

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.

2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the committee.

ARTICLE 48

Advisory jurisdiction of the Court

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

ARTICLE 49

Reasons for advisory opinions

1. Reasons shall be given for advisory opinions of the Court.

2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

ARTICLE 50

Expenditure on the Court

The expenditure on the Court shall be borne by the Council of Europe.

ARTICLE 51

Privileges and immunities of judges

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

SECTION III

MISCELLANEOUS PROVISIONS

ARTICLE 52

Inquiries by the Secretary General

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

ARTICLE 53

Safeguard for existing human rights

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental

freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.

ARTICLE 54

Powers of the Committee of Ministers

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

ARTICLE 55

Exclusion of other means of dispute settlement

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

ARTICLE 56

Territorial application

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.

3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

4. Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

ARTICLE 57

Reservations

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.
2. Any reservation made under this Article shall contain a brief statement of the law concerned.

ARTICLE 58

Denunciation

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.
2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been

performed by it before the date at which the denunciation became effective.

3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

ARTICLE 59

Signature and ratification

1. This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.

2. The European Union may accede to this Convention.

3. The present Convention shall come into force after the deposit of ten instruments of ratification.

4. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.

5. The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

DONE AT ROME THIS 4TH DAY OF NOVEMBER 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms

Paris, 20.III.1952

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

ARTICLE 1

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

ARTICLE 2

Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

ARTICLE 3

Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

ARTICLE 4

Territorial application

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

ARTICLE 5

Relationship to the Convention

As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly.

ARTICLE 6

Signature and ratification

This Protocol shall be open for signature by the members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

DONE AT PARIS ON THE 20TH DAY OF MARCH 1952, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory governments.

Protocol No. 4

to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto

Strasbourg, 16.IX.1963

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as the "Convention") and in Articles 1 to 3 of the First Protocol to the Convention, signed at Paris on 20th March 1952,

Have agreed as follows:

ARTICLE 1

Prohibition of imprisonment for debt

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

ARTICLE 2

Freedom of movement

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of order public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

ARTICLE 3

Prohibition of expulsion of nationals

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.
2. No one shall be deprived of the right to enter the territory of the State of which he is a national.

ARTICLE 4

Prohibition of collective expulsion of aliens

Collective expulsion of aliens is prohibited.

ARTICLE 5

Territorial application

1. Any High Contracting Party may, at the time of signature or ratification of this Protocol, or at any time thereafter, communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of this Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

2. Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may, from time to time, communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

3. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

4. The territory of any State to which this Protocol applies by virtue of ratification or acceptance by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a State.

5. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of all or any of Articles 1 to 4 of this Protocol.

ARTICLE 6

Relationship to the Convention

As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

ARTICLE 7

Signature and ratification

1. This Protocol shall be open for signature by the members of the Council of Europe who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of five instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

2. The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

DONE AT STRASBOURG, THIS 16TH DAY OF SEPTEMBER 1963, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory states.

Protocol No. 6

to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty

Strasbourg, 28.IV.1983

THE MEMBER STATES OF THE COUNCIL OF EUROPE, signatory to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty;

Have agreed as follows:

ARTICLE 1

Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

ARTICLE 2

Death penalty in time of war

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

ARTICLE 3

Prohibition of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

ARTICLE 4

Prohibition of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

ARTICLE 5

Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into

force on the first day of the month following the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the date of receipt of such notification by the Secretary General.

ARTICLE 6

Relationship to the Convention

As between the States Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly.

ARTICLE 7

Signature and ratification

The Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention. It shall be subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

ARTICLE 8

Entry into force

1. This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of

Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, acceptance or approval.

ARTICLE 9

Depositary functions

The Secretary General of the Council of Europe shall notify the member States of the Council of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) any date of entry into force of this Protocol in accordance with Articles 5 and 8;
- (d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

DONE AT STRASBOURG, THIS 28TH DAY OF APRIL 1983, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Protocol No. 7

to the Convention for the Protection of Human Rights and Fundamental Freedoms

Strasbourg, 22.XI.1984

THE MEMBER STATES OF THE COUNCIL OF EUROPE, signatory hereto,

Being resolved to take further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Have agreed as follows:

ARTICLE 1

Procedural safeguards relating to expulsion of aliens

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

- (a) to submit reasons against his expulsion,
- (b) to have his case reviewed, and
- (c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1.(a), (b) and (c) of this Article, when such

expulsion is necessary in the interests of public order or is grounded on reasons of national security.

ARTICLE 2

Right of appeal in criminal matters

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

ARTICLE 3

Compensation for wrongful conviction

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the nondisclosure of the unknown fact in time is wholly or partly attributable to him.

ARTICLE 4

Right not to be tried or punished twice

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or

convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.

ARTICLE 5

Equality between spouses

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

ARTICLE 6

Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which the Protocol shall apply and State the extent to which it undertakes that the provisions of this Protocol shall apply to such territory or territories.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of

a period of two months after the date of receipt by the Secretary General of such declaration.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of two months after the date of receipt of such notification by the Secretary General.

4. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

5. The territory of any State to which this Protocol applies by virtue of ratification, acceptance or approval by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, may be treated as separate territories for the purpose of the reference in Article 1 to the territory of a State.

6. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of Articles 1 to 5 of this Protocol.

ARTICLE 7

Relationship to the Convention

As between the States Parties, the provisions of Article 1 to 6 of this Protocol shall be regarded as additional Articles to the

Convention, and all the provisions of the Convention shall apply accordingly.

ARTICLE 8

Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

ARTICLE 9

Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date on which seven member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 8.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of the deposit of the instrument of ratification, acceptance or approval.

ARTICLE 10

Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) any date of entry into force of this Protocol in accordance with Articles 6 and 9;
- (d) any other act, notification or declaration relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

DONE AT STRASBOURG, THIS 22ND DAY OF NOVEMBER 1984, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Protocol No. 12

to the Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.2000

THE MEMBER STATES OF THE COUNCIL OF EUROPE, signatory hereto,

Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law;

Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Reaffirming that the principle of nondiscrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures,

Have agreed as follows:

ARTICLE 1

General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social

origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

ARTICLE 2

Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General of the Council of Europe. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

4. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

5. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or

groups of individuals as provided by Article 34 of the Convention in respect of Article 1 of this Protocol.

ARTICLE 3

Relationship to the Convention

As between the States Parties, the provisions of Articles 1 and 2 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

ARTICLE 4

Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

ARTICLE 5

Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 4.
2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period

of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

ARTICLE 6

Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) any date of entry into force of this Protocol in accordance with Articles 2 and 5;
- (d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

DONE AT ROME, THIS 4TH DAY OF NOVEMBER 2000, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Protocol No. 13

to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances

Vilnius, 3.V.2002

THE MEMBER STATES OF THE COUNCIL OF EUROPE, signatory hereto,

Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings;

Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;

Being resolved to take the final step in order to abolish the death penalty in all circumstances,

Have agreed as follows:

ARTICLE 1

Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

ARTICLE 2

Prohibition of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

ARTICLE 3

Prohibition of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

ARTICLE 4

Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration,

be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

ARTICLE 5

Relationship to the Convention

As between the States Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

ARTICLE 6

Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

ARTICLE 7

Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 6.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

ARTICLE 8

Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance or approval;
- (c) any date of entry into force of this Protocol in accordance with Articles 4 and 7;
- (d) any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

DONE AT VILNIUS, THIS 3RD DAY OF MAY 2002, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

European Convention on Human Rights

European Court of Human Rights
Council of Europe
F-67075 Strasbourg cedex

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Scotland Yard stole the identities of 80 dead babies so they could send police officers undercover

- Details were taken so officers could infiltrate protest groups
- Officers formed sexual relationships with their targets
- They modelled the process on the film, The Day of the Jackal
- Scotland Yard says practice no longer employed but launches investigation
- Former Director of Public Prosecutions called for a public inquiry

By [ARTHUR MARTIN FOR THE DAILY MAIL](#)

PUBLISHED: 23:06 BST, 3 February 2013 | UPDATED: 18:10 BST, 4 February 2013



The identities of 80 dead children were stolen by the police and used to create fake passports, it has been revealed.

The names and dates of birth were taken without the knowledge of the children's parents and used by officers infiltrating protest groups.

For 30 years, detectives from Scotland Yard trawled through national birth and death records looking for suitable identities. They used the birth certificates to apply for a variety of identity documents to make their aliases appear genuine.



John Dines, an undercover police sergeant, as he appeared in the early 1980s when he posed as John Barker, a protester against capitalism

In some cases officers spent up to ten years in the same guise. One, John Dines, adopted the identity of an eight-year-old boy called John Barker, who died in 1968 from leukaemia.

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Another officer said he felt he was 'stomping on the grave' of the four-year-old boy whose identity he used while working undercover in anti-racist groups.

And a third detective spent years living under the identity of a child who died in a car crash.

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Under cover officers using assumed identities also formed sexual relationships with targets in groups they had infiltrated in the 1980s, which included environmental and anti-racist groups.

Lord Ken Macdonald, former Director of Public Prosecutions, has condemned the practice and called for a public inquiry - warning that unacceptable practices might still be in use today.

He said it was 'really worrying' that police chiefs appeared not to have entirely ruled out a repeat of recently-exposed cases of officers entering sexual relationships with targets.

Speaking on the BBC Radio 4 Today programme, he said: 'How are you supposed to maintain a level of fair and objective evidence-gathering if you are having sex with the person you are targeting, fathering a baby and then abandoning it, using a dead child's identity?'

'These are all examples of areas in which the police have completely lost their moral compass and have completely failed to understand the boundaries.

'We don't know quite how these units were operating in days gone by. It looks as though they've effectively gone rogue. I am not at all clear how high up in Scotland Yard these sorts of operations were being organised.

He added: 'What we really need is a public inquiry into undercover policing which takes evidence, takes advice, sets out some guidelines, sets out some mechanisms so we can be confident these sorts of procedures are not being followed today.

'We need to know how we got there, where we are now and we need to be reassured that this sort of behaviour won't occur in the future and I think an inquiry is really the only way to achieve that.

'I do think the Government will think seriously about this because these sorts of stories seem to be endless.

'It is drip, drip, drip, it is corrosive, it is seedy and I think we really need to find ourselves in a position where we can reassure the public that this sort of behaviour is not going to carry on.'

After initial protestations that undercover officers getting sexually involved with targets could no longer happen, there appeared to have been a 'subtle shift in which it is being suggested that it could be appropriate in some circumstances'.

'This is a deeply ethical issue which the police have to grapple with,' he said.

Peter Bleksley, a former under cover

Hugo Taylor

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detective for the Metropolitan Police, said: 'In the undercover unit of which I was a director, we were completely dedicated to combatting serious and organised crime.

'We had nothing to do with protest groups or environmental campaigns.

'The state gave us a fake identities we required; passports, driving licences, or credit cards.

'We would never dream of using a dead child's identity, I cannot comprehend why anyone would want to adopt an identity rather than create one.

'These people were largely staffed with people who didn't have detective experience, clearly the management was lacking in experience and authority.

'In our unit we always had clear end games, to take the drugs, stolen commodities or to prevent murder. It seems these units had no clear goals or end games. It's a recipe for disaster.'

The technique of using dead children as aliases was borrowed from Frederick Forsyth's novel, *The Day of the Jackal*. Keith Vaz MP, the chairman of the home affairs select committee, said he was shocked by the 'gruesome' practice.

'It will only cause enormous distress to families who will discover what has happened concerning the identities of their dead children,' he said. 'This is absolutely shocking. My disbelief at some of the tactics used has become shock as a result of these latest revelations.

'It is clear that inappropriate action has been taken by undercover police in the past. But this has taken it to a new level.'

The practice was introduced 40 years ago by police to lend credibility to the back stories of covert operatives spying on protesters. It also guarded against the possibility that campaigners would discover their true identities.

Since then dozens of officers, including those who posed as anti-capitalists, animal rights activists and violent far-right campaigners, have used the identities of dead children.

One document appeared to suggest around 80 officers from a secret unit called the Special Demonstration Squad used such identities between 1968 and 1994. The total number could be higher.

An officer who adopted the identity of four-year-old Pete Black compared the methods used by Scotland Yard to those of the Stasi – the secret police in the former East Germany.

'A part of me was thinking about how I would feel if someone was taking the names and details of my dead son,' he said. 'I used to get this really odd feeling.'

The officer said he always felt guilty when celebrating the birthday of the four-year-old whose identity he took.

He was particularly aware that somewhere the parents of the boy would be 'thinking about their son and missing him'. To fully immerse himself in the adopted

Police were inspired by the film, *The Day of the Jackal*

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identity and appear convincing when speaking about his upbringing, Mr Black visited the child's home town to familiarise himself with the surroundings.

Black, who was under cover in the 1990s, said SDS officers visited the house they were supposed to have been born in so they would have a memory of the building.

'It's those little details that really matter – the weird smell coming out of the drain that's been broken for years, the location of the post office, the number of the bus,' he told the Guardian newspaper.

Fifteen separate inquiries have already been launched since 2011, when Mark Kennedy was unmasked as a police spy who had slept with several women, including one who was his girlfriend for six years, during his time under cover.

Scotland Yard said the practice was not currently authorised, but announced an investigation into 'past arrangements for undercover identities used by SDS officers'.

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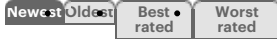


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MORE TOP STORIES

Confident hitmaker
was spotted indulging

► **Gordon Ramsay reveals his remorse over protégé who fell to his death on cocaine (and recalls taking his addict brother to get a 'fix')**

► **'I struggled to cope': McFly star Harry Judd reflects on his spiralling descent into drug abuse... and how fatherhood helped overcome anxiety**

► **Jennifer Lawrence reveals a producer called her 'perfectly f***able' as a teen and says she was shamed into losing 15lbs with a 'naked line-up'**

► **Beauty by Beckham! Victoria shares her secret in-flight beauty routine as she posts impressive video of her make-up tutorial from airplane bathroom**

► **A comeback at just 14! British child star Sophia Grace who wowed Ellen Degeneres at the age of eight with Nicki Minaj impressions, reveals her plans to be teen star**

► **'They were giving each other daggers the whole night': Katie Price 'publicly slams' philandering husband Kieran Hayler by telling fans she 'hates him'**

► **Brooklyn Beckham speeds around the streets of NYC on his bike... after unveiling new tattoo in tribute to father David on Instagram**

► **Papa Is A Rolling Stone! Georgia May Jagger nails off-duty model chic in a green slinky camisole as she strolls with a male pal ahead of dad's concert**

► **RIP to the style that used to be! Rita Ora puts on a low key appearance in bucket hat, bright trousers and corduroy trench as she arrives at Heathrow**

► **Blake Lively flashes her taut tummy in a slashed baseball jersey as she holds hands with handsome husband Ryan Reynolds after SEVEN outfit changes**

► **'It's been TERRIBLE:' Pregnant Abbey Clancy reveals perils of carrying her third child saying she has spent five months with her 'head down the toilet'**

► **She's a shady lady! Princess Eugenie looks chic in sunglasses as she touches down at LAX airport**
The Queen's granddaughter

► **Sheer beauty! Lorde takes to the stage in Berlin wearing a racy see through number with fishnet stockings as she continues her Melodrama world tour**

► **A family affair! Laura Dern, 50, poses for rare photo with the two kids she had with singer Ben Harper as well as acting icon mom Diane Ladd, 81**

► **Rod Stewart's ex Rachel Hunter, 48, shows she can still wear it well: Supermodel posts photo of herself in sheer nude dress**
She's still got it!

► **When Camilla met acting royalty: Brian Blessed has the Duchess of Cornwall in stitches as she hosts stars of the big screen at Clarence House**

► **PICTURED: Shamed Jeremy McConnell spotted in high-vis jacket as he sweeps the streets as part of his community service for beating ex Steph Davis**

► **That's Garner get you noticed! Former Made In Chelsea star Kimberley displays her peachy bottom as she models her stunning new swimwear range in Ibiza**

► **Women of Hollywood unite: J-Law, Margot Robbie and Cindy Crawford attend all-female empowerment event following Weinstein scandal**

► **Reese Witherspoon reveals she was assaulted by a director aged 16 and 'pressured by Hollywood agents into staying silent'**
Legally Blonde star

► **Still shining! Juliette Lewis, 44, looks hot in red gown at Elle Women event... 25 YEARS after she was**

nominated for an Oscar and dating Brad Pitt

▶ **Gwyneth Paltrow shimmers as she joins scarlet siren Kate Hudson at star-studded charity gala... days after revealing she was victim of Weinstein**

▶ **'He's incredible': Graham Norton lists Tom Cruise as one of his all-time favourite interviewees while Mickey Rourke was 'exhausting'**

▶ **'Only Sarah congratulated me': Nadine Coyle admits that ONE of her former Girls Aloud bandmates has been in touch following her new music**

▶ **The battle of Little Britain: Explosive backstage rows. Seething jealousy between Matt Lucas and David Walliams over very different fortunes**

▶ **Hostess with the mostess! Queen Letizia of Spain stuns in a floral chiffon frock as she welcomes guests for a series of audiences at Zarzuela Palace**

▶ **You're never too old to rock and roll! Singer-songwriter Alice Cooper, 69, reveals the secret behind his 40-year marriage to Sheryl Goddard**

▶ **'Where is the baby bump?' 'Pregnant' Khloe Kardashian accused of 'photoshopping' sweet snap of her kissing boyfriend Tristan Thompson**

▶ **'I do believe it was an accident': Duran Duran frontman Simon Le Bon believes Michael Hutchence's death wasn't intentional and he 'never seemed suicidal'**

▶ **A cheeky Chris Hemsworth CRASHES in on Thor: Ragnarok director Taika Waititi as he tries to give an interview In a cheeky mood**

▶ **Farewell to a rock 'n' roll legend: Tom Petty's daughter joins Sean Penn and Liberty Ross at post-funeral ceremony after laying him to rest at a temple**

▶ **Catherine Zeta-Jones 49 shows off**

jones, 48, shows off her remarkably smooth visage and youthful physique in a figure-hugging bardot dress for a day out in Cannes

► Coronation Street SPOILER: Reverend Billy Mayhew confronts Peter in ANOTHER heated face off on ... as he admits to killing Barlow's sister Susan

► 'Men I thought were friends have done it': MILLIONS of women join stars in using the #metoo hashtag to reveal they've been sexually harassed

► Laura Haddock reveals she's expecting her second child with husband Sam Claflin as she debuts blossoming baby bump in pink smock dress

► Smiling James Corden shows no signs of tension as he steps out with his pal after apologising for Harvey Weinstein gags following huge online backlash

► 'He's a porcine, pandering tool': Anthony Bourdain rips shreds off James Corden for making jokes about Harvey Weinstein's 'sex abuse'

► New documentary reveals Michael Hutchence was 'auditioning for movie roles with directors like Quentin Tarantino' before his death

► Celebs Go Dating's Sarah-Jane Crawford flaunts her sensational figure in a skimpy leopard print bikini as she hits the beach in LA
Sizzling physique

► A royal and a rapper! Playful Prince Harry photobombs Stormzy and an 'inspirational' nine-year-old guest at the WellChild Awards
Group shot

► The king's tribe! Elvis' daughter Lisa Marie Presley poses with her three kids at Elle Women In Hollywood bash
Altogether now

► Bra-vo! Shirtless Kristen Stewart wears bizarre cutaway blazer at the ELLE Women In Hollywood Awards in LA

... LA
Kristen flaunted her
fabulous figure

▶ **Jessica Chastain
rocks powerful
patent red frock at
ELLE's 24th Annual
Women in
Hollywood
Celebration... after
slamming Harvey
Weinstein**

▶ **'I'm clearly a
Scottish warrior':
Piers Morgan
discovers he is
related to Robert
the Bruce on GMB
(and Susanna Reid
meets her long lost
'twin')**

▶ **'Scatter my ashes
in a bar': Comedian
Sean Hughes wrote
poignant poem
about his own death
13 years before he
died of cirrhosis
aged just 51**

▶ **Vietnamese
actress says Harvey
Weinstein cornered
her in dark hotel
room wearing
nothing but a towel
to 'teach' her how to
perform sex scenes**

▶ **Liar's bloody twist
- and how victims
pay the price for
justice:
CHRISTOPHER
STEVENS gives his
verdict on the finale
of the thriller**

▶ **12 pretty major
questions we STILL
needed answering
after the infuriating
finale of Liar, by JIM
SHELLEY**

▶ **The Apprentice's
Karren Brady, 48,
and her lookalike
daughter Sophia,
21, prove to be in
high spirits as they
enjoy a giggle
following WellChild
awards**

▶ **'George Michael is
white?' Stevie
Wonder leaves
viewers in stitches
with his tongue-in-
cheek quip about
the late singer's
race during
Freedom
documentary**

▶ **Scarlett Moffatt
confirms she IS still
dating boyfriend
Luke Crodden...
after split
speculation when
she unfollowed him
on social media**

▶ **Make-up free Suki
Waterhouse ditches
the red carpet
glamour as she
displays her taut
tummy in crop top
on low-key outing in
New York**

▶ **'I don't even know**

if we're friends anymore': Amelia Lily admits she 'doesn't speak' with Sam Thompson following failed CBB romance

► Harvey Weinstein thinks he is only 'momentarily toxic' and will fight for his future in showdown at TWC board meeting
Just a bad patch?

► Roman Polanski rape victim Samantha Geimer tells Piers Morgan she FORGIVES the pedophile director for drugging and attacking her at 13

► Beaming Gerard Butler is in VERY high spirits after 'dramatic motorbike accident' as he makes return to the limelight with Geostorm co-star Abbie Cornish

► The Only Way Is Essex: Tommy Mallett cosies up to his chic girlfriend Georgia Kousoulou during filming... after shutting down rumours he's quit

► 'The judges are not my superior!' Strictly Come Dancing's Brendan Cole vents 'frustration' as he addresses criticism from his 'colleagues'... while teasing his return

► 'He was confused': Michael Hutchence's close friend reveals his doubts about marrying Paula Yates and was taking Prozac shortly before his death

► All that jazz! Catherine Zeta-Jones, 48, puts on a busty display in barely-there black gown as she leads the star-studded line-up at Cannes gala

► X Factor: FIRST LOOK at this year's hopefuls as they jet to South Africa, San Francisco, Istanbul and the South of France to battle it out at Judges' Houses

► Miley Cyrus flaunts her pert bust and washboard abs in tiny red string bikini as she soaks up the sun with Liam Hemsworth on beach day in Malibu

► Lots in common! Wiz Khalifa and stunning girlfriend

**stunning girmiena
Izabela Guedes
BOTH flash their
washboard abs as
they step out for
dinner in West
Hollywood**

► **'What doesn't kill
you makes you
stronger': Pregnant
Ferne McCann
admits refuses to be
labelled a 'single
mum'... as ex Arthur
Collins stands trial**

► **'It happens every
week': Birdman star
Andrea Riseborough
reveals her torment
under relentless
'psychologically
damaging'
harassment**

► **He just can't wait
to be king! Prince
William says
George's favourite
film is Disney classic
The Lion King - but
says he and Kate try
to limit their son's
screen time**

► **'We only go for the
green on the show!'
Jamie Foxx is left
with a nose full of
flour during
appearance on
Martha & Snoop's
Potluck Dinner Party**

► **'Are we f****ing
things up?' Chris
Hemsworth reveals
Mark Ruffalo had
doubts during
filming for Thor:
Ragnarok
Comedic shake-up**

► **Youthful Courteney
Cox, 53, goes make-
up free as jets into
New York sporting
stylish cream blazer
Friends star looked
casual in her jeans**

► **Father's Little
Helper! Sir Mick
Jagger, 74, is
supported by son
Lucas, 18, as he
leaves Amsterdam
ahead of final tour
dates with The
Rolling Stones**

► **The cream of the
crop (tops)! Emily
Ratajkowski
parades her
enviably taut abs in
revealing outfit...
after flouting strict
Moroccan dress
code**

► **Heaven sent!
Victoria's Secret
Angels Jasmine
Tookes, Jourdan
Dunn and Lais
Ribeiro sparkle in
metallic ensembles
at Golden Heart
Awards**

► **Hello sunshine!
Gigi Hadid shows off
her tiny waist in
midriff-revealing
yellow dress at All I
See Is You
screening in NYC**

Screening in NYC
At the screening of
Blake Lively's new film

▶ **She's got a Blair
for fashion! Actress
Selma puts on a
leggy display in
thigh-skimming
playsuit as she
steps out for
refreshments**
Grabbed a coffee

▶ **Human Ken Doll
Rodrigo Alves is a
man in black as he
jets into LA... in
wake of being
branded a 'monster'
on live TV**
He has a unique look

▶ **'She completely
changed my life':
Daisy Lowe gushes
over 'best friend'
Louise Redknapp...
after defending
relationship amid
marriage split**

▶ **'People comment
on how a woman
looks': Countryfile
star Ellie Harrison
says viewers ask
about her outfits
(while Chris
Packham gets
animal questions)**

▶ **Kardashian clan
film their Christmas
special in
Calabasas... but
'pregnant' Kylie
Jenner is noticeably
absent**

▶ **Ugly Betty star
America Ferrara
says she was
sexually assaulted
when she was NINE
YEARS OLD by a
'grown man' who
she saw every day**

▶ **Smiling Natalie
Portman channels
summer chic in tiny
denims as she
enjoys casual stroll
with sweet young
daughter Amalia in
Los Angeles**

▶ **SPOILER ALERT
'Now it's a
whodunnit': Liar
ends with a
shocking cliffhanger
as evil rapist meets
a grisly end - while
viewers name SIX
murder suspects**

▶ **One thing he can't
quit! Smoking 'Hot
Felon' Jeremy Meeks
puffs away on
cigarette... in wake
of filing for divorce
amid Chloe Green
affair**
Ended his marriage

▶ **Sophisticated
Claudia Winkleman
looks typically chic
as she joins guests
at fundraising
auction for victims
of Grenfell Tower
blaze**

▶ **Thigh's the limit!**
Selma L. Young

Ashley Graham flaunts hourglass figure in split skirt at Golden Heart Awards in New York
Flattered her figure in a thigh-split skirt

▶ **'You have been loved': Fans take to Twitter to praise George Michael after 'heartbreaking' new documentary**
Freedom reveals late singer's emotional past

▶ **Fro-yo for one! Kaia Gerber cuts a stylish figure in motocross inspired bottoms with a crop top for frozen yogurt run in Calabasas**

▶ **'One of the best comics of our generation': Tributes pour in for Sean Hughes after his death aged 51 from cirrhosis following 'years of hedonism'**

▶ **EXCLUSIVE: Spencer Pratt shares VIDEO of Heidi Montag during her five hours of labour, including her hospital beauty session, as stars show off newborn son Gunner to DailyMailTV**

▶ **Strictly Come Dancing: 'It makes me feel fantastic!' Debbie McGee, 58, laughs off romance rumours with Giovanni Pernice, 27, but finds it flattering**

▶ **Made In Chelsea: Charlie has his eye on Mimi AND Tiff, Jamie and Frankie have been having sleepovers and Julius enjoys a Scotch Egg a little too much**

▶ **Alessandra Ambrosio teases a glimpse of her supermodel pins in semi-sheer jumpsuit as she attends ELLE's 24th Annual Women in Hollywood bash**

▶ **Pretty in pink! Rihanna shows off her knockout legs in Nina Ricci mini dress for sultry Instagram snaps**
After she spoke about her body 'fluctuating'

▶ **'Pregnant' Khloe Kardashian locks lips with boyfriend Tristan Thompson by the beach in**

heart-melting photo... as she gives relationship advice

► The Real Housewives Of Orange County: Shannon Beador admits marriage failing after clash with Peggy

Seemed happier than ever last year

► FIRST LOOK: She's flawless! Cheryl proves she can pull off ANY look as she models her new makeup range for L'Oreal in smouldering shots

► Recovering addict Jeremy McConnell unveils controversial new inking showcasing a nun snorting a suspicious white powder

► Electra-fying! Carmen smolders in tight pink top and as she joins Tara Reid at Boo 2! A Madea Halloween premiere in LA
Stunning stars

► Red carpet royalty! Princess Olympia of Greece shows off her impressive pout as she steals the spotlight in a form-fitting dress at a charity gala in NYC

► Maggie Gyllenhaal wears demure and elegant floral print dress at Golden Heart Awards... as she continues to strip down on The Deuce

► Look away, Billie! Piper's ex Laurence Fox is spotted in clinch and walking the dog with posh new lover Lilah Parsons
He's moved on

► 'Beautiful Girls' screenwriter Scott Rosenberg says 'everybody f*ing knew' about Harvey Weinstein - as he admits he's 'ashamed'**

► 'The relationship just ran its course': Vampire Diaries couple Phoebe Tonkin and Paul Wesley 'split' AGAIN after four years together
Began dating in 2013

► Ben Affleck and estranged wife Jennifer Garner look tense as they co-parent amid claims she is furious over actor's groping scandal

▶ **She snaps back quick! Nikki Reed stuns in skintight black dress just three months after giving birth as she takes Ian Somerhalder to Women In Hollywood do**

▶ **Leggy lady! Chrissy Teigen shows off model pins in Daisy Dukes as she and John Legend take daughter Luna out on family bonding day in LA**

▶ **Two peas in a pod! Reese Witherspoon and her look-alike daughter Ava Phillippe attend ELLE's Women In Hollywood awards**
More and more like mum

▶ **They once were rivals! Vanessa Hudgens and Julianne Hough giggle as they enjoy a Grease: Live reunion at ELLE's Women In Hollywood**
Grease is the word

▶ **Vest-ed interest! Busty Jenna Dewan stuns in tight white top as she goes shopping with daughter Everly in LA**
Years of honing her shape on the dance floor

▶ **Quick-changing Blake Lively shines bright in SEVEN head-turning outfits as she hits the promo trail in New York**
The actress, 30, made every second count

▶ **PICTURE EXCLUSIVE: Brendan Cole joins pregnant wife Zoe Hobbs and daughter Aurelia at Legoland... amid speculation he is set to QUIT Strictly**

▶ **'We are both thrilled': Dale Earnhardt Jr. and his wife Amy announce they're expecting first child**
Share the news of their expanding clan

▶ **FIRST LOOK: Ariel Winter is ravishing in red as she sizzles for Golden Age glamour shoot at a Hollywood castle on the pages of LaPalme Magazine**

▶ **Suits you! Emma Willis steps out in Manchester with playing cards stuck to her HEAD to keep her short pixie crop in check**

► **So in love! Jenny McCarthy plants a smooch on her husband Donnie Wahlberg at Blue Bloods screening in New York**
An intimate smooch

► **Chest is best! Amber Valletta, 43, offers an eyeful of cleavage in sultry sequined frock at Golden Heart Awards**
Smouldered in pretty sequins

► **Making himself at home! Chris Hemsworth goes BAREFOOT at exclusive Japanese restaurant during promotional tour for Thor: Ragnarok**

► **Forget the per, and pot, just revel in George's perfect pop: Christopher Stevens reviews last night's TV**

► **'He's my hero': Amy Schumer talks trolls and Broadway debut in Steven Martin's play on Jimmy Kimmel Live**
The actress spoke about her stage work

► **Secrets of an A-list body: How to get Janet Jackson's impressively toned shoulders**

► **Windswept Game of Thrones star Natalie Dormer cuts a stylish figure in a monochrome pencil skirt as she enjoys night out in London**

► **'Is it a skinny week or a fat week?' Rihanna candidly reveals the struggles of dressing her 'fluctuating' body and admits she 'pays attention every day'**

► **White hot! Model Jessica Hart flaunts slimline figure in plunging button-up blouse and flared trousers at Golden Heart Awards in NYC**

► **Following Michelle: White House photographer Amanda Lucidon reveals her favorite photos of the former First Lady**
In a new book

► **Dancing Duchess! Pregnant Kate twirls with life-size Paddington Bear as she displays a fresh**

hairstyle and a hint of a baby bump as she meets cast

► She really **SHOULDN'T** have let him go! Scientist Neil DeGrasse Tyson insists Titanic character Jack would **NOT** have drowned so easily in real life - if at all

► Men face the danger of Louise Thompson being single again. Ryan Libbey told her 'The Ry-man' wanted to be 'released' and have some 'boy time' on MIC

► Fashion statement! Busy Philipps dons wide-legged black leather overalls for Women In Hollywood Celebration
Freaks And Geeks star

► 'I gag but she loves it!' Spencer Pratt admits he leaves wife Heidi to change their newborn son Gunner's nappies... and explains £20k worth of **CRYSTALS**

► The Voice: Miley Cyrus keeps it in the family and picks father Billy Ray as mentor for her singers on NBC show
The 24-year-old pop star kept it in the family

► 'I'm married to an old b****rd': RHOS star Lisa Oldfield asks Karl Stefanovic to consider her for Lisa Wilkinson's former Today show job

► 'She was the hero': Chris Hemsworth reveals his wife Elsa Pataky saved his life during a trip to the Himalayas

► He drives her crazy! Britney Spears flaunts bikini body as she shares loved up video montage with hunky beau of one year Sam Asghari

► 'She got her ears pierced': Blac Chyna shows off 11-month-old Dream Kardashian's new diamond studs on Snapchat

► Carrie Fisher once gave a predatory Hollywood producer a cow tongue wrapped in a Tiffany box and a vicious note after 'he assaulted her friend'

riend

► **Dancing With The Stars: Sasha Pieterse gets the boot after The Little Mermaid rumba on Disney Night**
Pretty Little Liars star was shocked

► **Tilda Swinton, 56, embraces her trademark androgynous style as she rocks an oversized shirt and skinny trousers at the Film Festival Lumiere**

► **Following Michelle: White House photographer Amanda Lucidon reveals her favorite photos of the former First Lady**

► **'Michael was probably staring into that same abyss': Jimmy Barnes reflects on suicide of 'dear friend' Hutchence after he tried to kill himself in 2012**

► **'One of many milestones we'll share!' Maisie Williams congratulates her BFF and Game Of Thrones co-star Sophie Turner on engagement to Joe Jonas**

► **No need for expensive lotions: Meryl Streep's beauty secret that leaves her with blemish free skin is to never touch her face**

► **Duncan Bannatyne, 68, cuts a dapper figure while his wife Nigora Whitehorn, 37, commands attention in plunging mini dress as they arrive hand-in-hand for star-studded WellChild Awards**

► **'I don't want to live forever - what could be worse?' Comedian Sean Hughes admitted 'pushing' his body to 'extreme hedonistic limits' before death at 51**

► **PDA alert! Sofia Richie, 19, wraps her arms around boyfriend Scott Disick, 34, after touching down in Milan**

► **Love Island's Amber Davies looks chic in a flirty blue minidress as she**

cosies up to
boyfriend Kem
Cetiney at glitzy
event in Cannes

► **Hotter Than Hell!**
Dua Lipa sizzles in
slinky one-
shouldered dress as
she flaunts her legs
in statement leather
boots while being
honoured at star-
studded ASCAP
Awards

=

MORE DON'T MISS

► **'Daddy's home!'**
Chrissy Teigen posts
hunky photo of
shirtless John
Legend holding
baby Luna as he
reunites with family
after world tour

► **PICTURE
EXCLUSIVE:** Heavily
pregnant Ferne
McCann shows off
her baby bump as
she returns to
filming This
Morning... while ex
Arthur stands trial

► **'Single and happy!'**
Mel B flaunts her
rock-hard abs in tiny
blue bikini as she
cosies up to 'the
love of her life' Gary
Madatyan during
Hawaiian getaway

► **X Factor: 'Buzzing!'**
Fans can't contain
their excitement for
Cheryl's Judges'
Houses
appearance... as she
takes on Simon
Cowell's nasty
streak in new clip

► **Judy Finnigan, 69,**
displays her svelte
figure in floral top
alongside husband
Richard Madeley,
61... after he made
controversial joke
about Harvey
Weinstein

► **Hollyoaks SPOILER
ALERT:** Tony
Hutchinson falls
back into the arms
of ex-wife Mandy as
the pair share a
tender kiss... ahead
of son Harry's
disappearance

► **The naked
ballerina!** Lingerie
model Myla
Dalbesio poses
topless with a
skimpy tutu in
Aruba for the Sports
Illustrated Swimsuit
Edition

► **Gabby Logan goes
off the deep end:**
Presenter enjoys a
visit to iconic pool
at Cliveden House
where Profumo first

where Orlando first spotted Christine Keeler

► **She's a wonder! Lynda Carter, 66, stuns in black skirt-suit at Golden Heart Awards in NYC**

► **'I had to eat a baby': Deleted scene from Stephen King's It depicted Pennywise devouring an infant**

► **This is the wife! Amy Adams wears conservative blouse and skirt as she gets into character as Dick Cheney's spouse on set of Backseat**

► **Sisterly shopping spree! Tallulah and Scout Willis go casual cool as they share a giggle while out in LA**

► **Real Housewives of Cheshire: That's a wrap! Tanya Bardsley looks chic in black minidress as she joins nemesis Dawn Ward for slap-up meal to celebrate the end of filming**

► **She's still got it! Child star who played cancer-stricken little girl in Sisterhood of the Traveling Pants is all grown up and finding further fame on Netflix, 12 years after her big screen hit**

► **Simply stunning! Cindy Crawford keeps it casual in black T-shirt and white skinny jeans in Santa Monica**

► **Getting a jump on it! Pink jets around NYC donning slick navy jumpsuit and red boots to promote new album**

► **Forever young! Demi Moore, 54, cuts a youthful figure in baggy pants and tight T-shirt as she shops up a storm in West Hollywood**

► **'It has spoiled the programme!' Strictly Come Dancing fans left FURIOUS as excited Ruth Langsford accidentally reveals the results hours too early**

▶ **Famiglia! Zoe Saldana goes make-up free as she spends the day exploring Milan with husband Marco Perego and their three sons**

▶ **Leggy Alesha Dixon puts on a sizzling display in revealing mini dress alongside beau Azuka Ononye as she leads select guestlist at PR guru's luxurious Los Angeles wedding**

▶ **Getting the party started! Crown Princess Victoria joins the King and Queen of Sweden at a science symposium to kick off H&M founder's 70th birthday celebrations**

▶ **Orlando Bloom walks his pooch Mighty in Prague following shirtless workout... as ex Katy Perry reveals she's single**

▶ **She's got those supermodel genes! Christie Brinkley's daughter Sailor, 19, poses in a parade of bikinis for her Sports Illustrated Swimsuit shoot**

▶ **Support system! Mandy Moore boisterously cheers while in the stands alongside television daughter for This Is Us football scene**

▶ **Denise Richards slashes price of her Hidden Hills luxury mansion by \$1.3 MILLION... after over two years on the market**

▶ **'It probably was God's plan': Dolly Parton, 71, talks about why she never had kids as she promotes first album of children's songs**

▶ **Craig Revel Horwood weighs in on Strictly spat between Brendan Cole and Shirley Ballas... as he reveals he's struggling to find love online**

▶ **Double date night! Ryan Seacrest takes Shayna Taylor to wine and dine with Live co-host Kelly Ripa and her hubby Mark Consuelos in New York**

NEW YORK

► **Kimberley Garner showcases her athletic physique and peachy posterior in a skimpy white swimsuit as she poses up a storm in sultry video**

► **'With heavy and broken hearts': Canadian actor John F Dunsworth of Trailer Park Boys passes away at 71**

► **La La Anthony flaunts cleavage in corseted jumpsuit at VH1 gala... as husband Carmelo nails Night King Halloween costume**

► **Holding her money tight! Iggy Azalea clutches a purse to her chest as she's seen for first time since news broke she's 'being sued for \$300k by AmEx'**

► **Alexandra Burke smiles defiantly as she arrives for Strictly rehearsals... after being caught up in a FIX row over working with judge Craig Revel Horwood**

► **'Pregnant' Kylie Jenner reveals she has a big appetite as she posts image of her calorie-laden waffle breakfast**
Eating for two?

► **She sure Cannes work it! Catherine Zeta-Jones, 49, shows off her flawlessly line-free face as she smoulders in one-shoulder black gown**

► **'I'm single!' Katy Perry reveals her key to making American Idol work with her tour schedule... no boyfriends**

► **'It was a scary experience': Maria Fowler discusses harrowing sexual assault at the hands of a 'well known glamour photographer'**

► **Margot Robbie 'has secretly been married for years' to Tom Ackerley... despite THAT ring photo and ceremony last year**

► **'Really Russell?'**

Thor stars Chris Hemsworth and Mark Ruffalo laugh off actor Crowe's claims that one particular fighting scene was 'already done' in Gladiator

► 'There is absolutely no excuse in not staying fit': Joanna Krupa slams 'lazy' people who don't 'get off the sofa' while insisting she consumes 2k calories a day

► Will Dean go to jail? Tori Spelling's husband is accused of 'failing to make \$1,500-a-month child support payments for his teen son'

► That's amore! Avril Lavigne, 32, covers up in a hoodie and leather pants as she holds hands with JR Rotem, 42, when leaving Italian restaurant

► Simple and sleek! Take a cue from Eva Longoria, Kate Hudson and Emma Stone and ditch your LBD's in favor of stylish and sophisticated jumpsuits

► No sibling rivalry here! Maks Chmerkovskiy brings Peta Murgatroyd on DWTS double date with brother Val and girlfriend Jenna Johnson

► J.K.Rowling tops the Forbes list of highest-paid European celebrities with a staggering £71million... as Coldplay and Adele come third and fourth

► Twinning is winning! Best buddies Leonardo DiCaprio and Tobey Maguire wear matching outfits as they stroll through New York

► 'Standing in solidarity isn't enough!' Blake Lively says Harvey Weinstein's behavior is widespread as she calls for action
Taking a stand

► The X Factor: Singing hopeful Spencer Sutherland is secretly dating stunning Hollywood actress Madison

Iseman
Keeping her secret

► **Anna Nicole Smith's doctor, who prescribed drugs she overdosed on, dishes on day he partied with her at gay pride parade and tells of her lesbian affair**

► **'Residuals getting larger!' Savannah Guthrie proudly shares a photo of a check for ZERO DOLLARS - as one fan suggests it might be from her cameo on Sharknado 3**

► **So much for reality! Busty Kim Kardashian teaches North to ice-skate in blistering heat as the Kardashian clan film Christmas special... TWO months in advance**

► **Jesinta Campbell shows off haul of freebies worth over \$3350 including bottles of Moet, clothing and makeup after flaunting her new \$135,000 Range Rover**

► **'I've never eaten a kebab': Prince Harry admits he hasn't ever indulged in a doner on the way home from a night out - as he jokes with youngsters at the WellChild Awards**

► **A quick change! Duchess of Cornwall looks elegant in a red embroidered skirt hours after sporting polka dots at the Women of the Year Lunch**

► **Miley Cyrus is a natural beauty with minimal makeup as she plugs The Voice collaboration with father Billy Ray on Today show**

► **EXCLUSIVE: 'I won't tolerate abuse about my appearance': Human Ken Doll Rodrigo Alves left furious as he is branded a 'MONSTER' live on TV**

► **How will Liar end? Viewers reveal their theories about how the gripping ITV drama will reach its nail-biting finale (including murder, a secret accomplice and a HUGE twist)**

► **Family day out!**
Beaming Pink steps out with husband Carey Hart and daughter Willow, six, for stroll in NYC

► **'Monday just got better!'** Model Ashley Graham gives fans an eyeful of her famous curves as she poses VERY provocatively in a behind-the-scenes video from her latest lingerie shoot

► **Social worker says EastEnders 'put children at risk' with 'damaging' portrayal of the profession in controversial scene that saw Stacey Fowler's toddlers taken away**

► **Doting dad Ryan Gosling, 36, cradles daughter Esmeralda as he steps out in LA with stunning partner Eva Mendes, 43, and toddler Amada**

► **'Shoutout to the girls with breasts that point down like mine!'** Plus-size model Tess Holliday shares a saucy cleavage-baring snap to prove that 'not perky' boobs can still be sexy

► **'Hasn't he seen his own acting?'** New Zealand-born Riverdale star KJ Apa is slammed by furious Canadians after branding Vancouver 'boring'

► **'Happy for the both of you!':** Demi Lovato congratulates ex Joe Jonas after he announces engagement to Sophie Turner
Dated in 2010

► **Lara Trump shares a sweet clip of one-month-old Luke having a bath, as she goes horseback riding for the first time since birth - after Eric admitted that he is 'ready' for second baby**

► **'Her vulnerability makes her brilliant':** Matt Lucas praises actress Sheridan Smith for confessing her 'life was falling apart' as he discusses his own battle

► **Casey Batchelor flaunts her 32FF assets and pert**

	posterior in a VERY skimpy blue bikini at yoga retreat... as she reveals plans to MARRY secret boyfriend
	▶ 'Without her I wouldn't have written an album': Simon Webbe credits fiancée Ayshen Kemal for helping him beat depression... as he reflects on proposal
	▶ 'He looks SO much like his dad!' Fans go wild over Louis Tomlinson's similarity to his son Freddie as ex Briana Jungworth shares a rare snap of their sweet baby
	▶ Black Panther releases first full-length trailer as the Marvel film promises a fierce battle between the superhero and his nemesis Erik Killmonger
	▶ Make-up free Danielle Lloyd looks exhausted as she stocks up on energy drinks... a month after giving birth to fourth son Ronnie She has four young sons
	▶ Suits them! Evangeline Lilly smiles brightly as she gears up for another day of filming Ant-Man sequel with co-star Paul Rudd
	▶ Gerard Butler reassures fans he's safe and well after being 'rushed to hospital following dramatic motorbike accident'
	▶ Thousands of Ed Sheeran fans face anxious wait as Galway Girl singer breaks arm when car knocks him off his bike days before start of Asia tour
	▶ Something to tell us, Beatrice? 29-year-old princess strides through New York wearing a 'Team Mikey' hoodie -so, could it be a gift from VERY eligible Michael?
	▶ 'We cannot wait for her arrival!' Nicole Trunfio announces she is pregnant and expecting a daughter with husband Gary Clark Jr
	▶ 'He was bullying and nasty': Kate Winslet REFUSED to thank Harvey

Thank Harvey Weinstein in her 2009 Oscar acceptance speech (which included 19 other names)

► **'I am sorry for saying something I did not mean': Donna Karan apologizes AGAIN for her remarks defending Weinstein**
Calls to boycott brand

► **TOWIE: Slim James Argent exudes confidence at filming following his cosmetic surgery... after claiming four stone weight loss made his nose stand out**

► **Jason Derulo's employee was 'asleep' in his home as 'burglars stole \$680K in jewelry and money in the suspected inside job'**
Mansion was broken into

► **'My pastor follows me on Instagram': Ashley Graham reveals why she keeps her sexy side in check on social media... as she poses for high fashion shoot**

► **Braless Louise Thompson is blasted for showing off her nipples in a tight dress - but fans of MIC star insist women should NEVER be forced to hide their bodies**

► **Keeping Up With The Kardashians: Kourtney Kardashian confronts hard-partying Scott Disick as she says 'I don't want the kids to see him like this'**

► **'We were all abused': Former member of Pussycat Dolls says the band was a front for a 'prostitution ring' and singers were 'abused' by industry execs**

► **Willow Smith sports a vintage T-shirt and jeans as she rocks out while performing at AfroPunk festival in Atlanta**
Another eclectic performance

► **'Eat something!' Slimmed-down Holly Willoughby sparks concern among fans with her latest fashion snap... but others ask for her secret**

► **'I was humiliated': Joan Collins admits she was 'harassed by two men'**

	by two megastars aged 21... and does NOT want her grandchildren to 'go through the same'
	▶ Gwyneth's Goop handed accolade for WORST pseudoscience nonsense after promoting sex dust, vaginal steaming and healing stickers
	▶ No heartbreak here! Donna Air flashes a smile as seen for the first time since secret split from James Middleton was revealed Bouncing back
	▶ 'I will get rid of the other two!' Chris Hemsworth reveals two of his three children aren't impressed by his role in blockbuster movie Thor
	▶ Danish director Lars Von Trier denies sexually harassing pop star Bjork after she claims she was 'punished' for rejecting his advances
	▶ PICTURE EXCLUSIVE: Michael Fassbender and Alicia Vikander wear WEDDING RINGS during 'post-marriage' celebration in Ibiza after 'tying the knot in private
	▶ Christine Lampard stuns in a plunging printed dress while Natalie Dormer works androgynous chic in a red suit at Women of the Year Lunch in London
	▶ Kate's mum-to-be makeover! Duchess unveils new shorter locks - but did she go for the chop because pregnancy hormones make her hair break?
	▶ Check out this pair! Liam Payne takes style inspiration from girlfriend Cheryl as he steps out in LA in a quirky plaid shirt... as he brands her the 'best mum in the world'
	▶ TOWIE: Amber Turner is glum yet glam in thigh-skimming boots and striped mini skirt... as she joins Yazmin Oukhellou and Courtney Green for filming
	▶ Love Island's Montana Brown flaunts her jaw-

dropping beach body in skimpy swimwear as she continues to soak up the Maldives sun with pal Georgia Harrison

► 'Gutted!' Hillary Clinton FAILS to turn up for TV and radio appearances with Philip Schofield, Women's Hour and Graham Norton after 'hurting her foot'

► Richard Madeley makes controversial joke about Harvey Weinstein while raffling off a 'relaxing body massage' at a charity gala

► 'Sexual assault is no laughing matter': James Corden apologises for Weinstein gags at Hollywood gala and says he was just trying to shame movie mogul

► X Factor: Viewers left 'confused' as Michelle Keegan's ex Brad Howard is noticeably absent from Six Chair Challenge
Dated for two years

► Smiling Lewis Hamilton embraces his paternal instincts as he cradles his godson on a stroll in NYC... as he admits racing comes before dating

► Game of Thrones star Roy Dotrice who also starred in Oscar-winning movie Amadeus has died aged 94
He also joined the second season

► Gwyneth Paltrow looks pensive in LA... after thanking peers for their 'support' at first public appearance since shocking Weinstein revelations

► Former TOWIE star Danielle Armstrong shows off her slimmer figure in slinky sweater and jeans on girls' night out... after dropping down to 25-inch waist

► PIERS MORGAN: Kate Winslet's shameful hypocrisy over Weinstein, Polanski and Woody Allen is why I don't believe Hollywood will ever change

► Working out your frustrations? Lucy Mecklenburgh flaunts her rock-hard abs in skimpy gym gear during gruelling session...

after 'split' from
beau Ryan

► 'The upside of not
being a perfect 10':
Big Bang Theory's
Mayim Bialik says
men like Harvey
Weinstein didn't hit
on her because she
refused to diet

► Strictly FIX row:
Outrage as it
emerges Alexandra
Burke was coached
by judge Craig Revel
Horwood when she
starred in musical
Sister Act

► Celebrities
including Rita Ora,
Cara Delevingne and
David Beckham are
rapped for plugging
products online
without admitting
they are ads

► Make-up free Lily
Allen is glued to her
phone as she steps
out in sweater and
skinny jeans... after
she made cruel
taunts to Chris
Eubank Jnr about his
father

► That's not a sober
look! Imogen
Thomas sinks a pint
of Guinness as she
enjoys a rare night
away from her
children in PVC
mini-skirt and racy
boots

► 'I thought it was
clear - he is a sad,
sick man': Woody
Allen backtracks on
comments saying he
felt 'sad' for Harvey
Weinstein
He was misinterpreted

► Clubber's backless
dress was left
moulded to her arm
as blisters appeared
after nightclub 'acid
attack' by TOWIE
star Ferne McCann's
ex-boyfriend

► Leonardo DiCaprio
enjoys low-key
shopping trip in
New York... in his
first outing after
showing support for
alleged victims of
Harvey Weinstein

► 'It was brutal!'
Brothers Leon and
Alex discuss being
separated during X
Factor's nail-biting
Six Chair
Challenge... which
saw only ONE
succeed

► Miami Mia! Italian
millionaire Gianluca
Vacchi, 50, flaunts
his bulging muscles
and rock-hard abs in
TINY white Speedos
on Florida beach

► 'His lucky number
SE7EN!' Brooklyn
Beckham pays

**tribute to father
David's iconic shirt
number as he gets
two fresh inkings at
New York tattoo
studio**

**► Keeping Up With
The Kardashians:
Kim frets about
THOSE Mexican
bikini shots while
Kourtney proves her
booty had no
cellulite issues on
reality series**

**► 'It's like no time
has passed at all':
Caroline Quentin
reflects on reuniting
with old friend
Martin Clunes for
Doc Martin... 19-
years after Men
Behaving Badly**

**► What would Lady
Mary Crawley say?
Busty Michelle
Dockery strips off as
she romps with
actor Juan Diego
Botto for X-rated
sex scene in Good
Behavior**

**► Sophia Bush
displays her
enviably trim figure
and tiny waist in
summery halterneck
dress as she heads
for breakfast with a
friend in LA**

**► 'You don't know
what you're talking
about': Lysette
Anthony hits back
at trolls who
accused of her
USING Weinstein
rape claims to 'raise
her profile'**

**► Still happily
married! Julia
Roberts is seen arm-
in-arm with
husband Danny
Moder at Oprah
Winfrey's Gospel
Brunch amid split
claims**

**► Corrie star Nicola
Thorp tweets
furious sexual
harassment claims
about being
'threatened' and
pressured for sex by
TV directors**

**► 'It was very well
known': Larry King's
wife Shawn catches
herself saying
Weinstein
allegations were
common knowledge
'I didn't personally
know'**

**► Harvey Weinstein
prepares for battle:
Disgraced exec to
take on brother Bob
in 'fiery showdown'
as he argues that he
was illegally sacked**

**► Beaming Gemma
Atkinson can't hide
delight as she steps
out following her
impressive Strictly
performance...**

**hours after fueling
Gorka romance**

▶ **Grungy Taylor
Swift slips into an
array of rock-chic
ensembles as she
takes over a classic
London double-
decker bus to film
new music video**

▶ **'I'm the uncool
dad': Freddie
Flintoff reveals he is
mocked by his
children over
surprising addition
to Fat Friends The
Musical... ahead of
stage debut**

▶ **Playboy pin-up
Claudia Romani
shows off her
curves and peachy
derriere in tiny
thong bikini as she
soaks up the sun on
Florida beach
On South Beach**

▶ **'Get the names of
the contestants
right!': Piers Morgan
SLAMS Strictly's
Shirley Ballas on
GMB for getting
Charlotte Hawkins'
name wrong**

▶ **Solo Nick Knowles,
55, looks pensive
while enjoying
cigarette break in
London... amid
claims he is dating
actress Olivia
Hallinan, 32, after
links to mutiple
beauties**

▶ **Kate's brother
James and TV's
Donna Air secretly
split up: Couple end
relationship months
after getting back
together following
'sabbatical'**

▶ **TOWIE's Amber
Turner goes braless
in plunging black
dress as she cosies
up to Jasmin Walia's
younger brother
Danny on night
out... after Dan
Edgar 'split'**

▶ **'I'm more relaxed
around junkies than
I am most people':
New dad Russell
Brand reveals he
still enjoys company
of addicts... 15
years after quitting
heroin**

▶ **The Deuce: Maggie
Gyllenhaal goes
nude AGAIN as her
prostitute character
turns to
pornography to
make money on new
TV series
Bold new drama**

▶ **'Noodles for life!'
Ivanka Trump
mimics iconic Lady
and the Tramp
scene with son
Joseph as they enjoy
traditional
celebratory**

spaghetti

► **Former Glee star Mark Salling 'cut both his wrists in a suicide attempt a month and a half before pleading guilty to possession of child pornography**

► **Coronation Street SPOILER: Eileen Grimshaw hints at trouble with husband Pat Phelan as she is pictured filming with a swollen and cut eye**

► **'Wannabe WAGs beware': Helen Skelton warns against dating sports stars because of their short careers - and her husband has meltdowns about teams**

► **Blac Chyna looks a far cry from her usual glamorous self as she clads her famous curves in a casual logo-print ensemble while arriving at LAX airport**

► **PICTURE EXCLUSIVE: Princess Of The Caribbean! Kate Upton pulls at sexy swimsuit as she poses up a storm on the beach for Sports Illustrated**

► **'I said yes!': Game Of Thrones star Sophie Turner, 21, accepts proposal from Joe Jonas, 28, after he presents her with an engagement ring**

► **Strictly Come Dancing: 'It's an injustice!' Fans outraged as EastEnders star Davood Ghadami competes in the dance-off... after being taken ill during rehearsals**

► **Strictly Come Dancing: 'It's been brilliant from start to finish!' Charlotte Hawkins is the third contestant to leave after tense dance-off with Davood Ghadami**

► **'Harper has all her big brothers back!': Victoria Beckham can't contain her excitement over her reunited brood as she shares beaming snap on Instagram**

► **X Factor: Louis Walsh throws Six Chair Challenge into chaos with shocking triple sing-off... as show is called a 'fix' after Slavko goes to Judges' Houses**

▶ **Sizzling! Bella Thorne shares a TOPLESS photo on Instagram... as her romance with new boyfriend Mod Sun heats up**
Giving fans an eyeful

▶ **Nothing Meeks about him! 'Hot Felon' Jeremy looks undeniably trendy as he takes a break from his modelling career to take a slick Ferrari out for a spin**

▶ **Selma Blair, 45, flaunts her legs in cropped denim shorts as she enjoys a day out with her son Arthur, six, in LA**
Proved inseparable

▶ **'Talking about it is the only way back from the darkness': Coronation Street star Kym Marsh pays tribute to stillborn son Archie - and urges others to speak out**

▶ **Water(house) way to make a statement! Suki flaunts her style credentials in a bright red midi-skirt and grunge boots in New York**

▶ **Sunday Funday with grandma! North West is seen dancing in Kris Jenner's mansion as mom Kim Kardashian takes Saint to Paw Patrol show**

▶ **She's no dummy! Pink keeps her son Jameson happy with 'moustache' pacifier as they step out in NYC... after VERY candid revelations about her marriage**

▶ **Three's company! Tom Hanks and wife Rita Wilson take their Big Fat Greek Wedding apprentice Nia Vardalos for a stroll through the streets of New York**

▶ **Custody hand-over! Blac Chyna's son King plays with half-sister Dream in stroller... before Khloe Kardashian bonds with niece**

▶ **'He's a monster': JJ Abrams FINALLY slams former collaborator Harvey Weinstein's 'viciously repulsive abuse of power' amid sex assault allegations**

▶ **John Oliver slams the Academy just 24**

	<p>hours after they expelled Weinstein and questions why Polanski, Cosby and Casey Affleck are still members</p>
	<p>▶ Make-up free Naomi Watts, 49, displays her youthful complexion as she steps out for casual dog walk in NYC</p> <p>Displayed her enviably youthful complexion</p>
	<p>▶ 'I have mended myself': Dawn French, 60, admits she is still a 'bit broken' from her divorce to Lenny Henry... seven years after marriage ended</p>
	<p>▶ X Factor: Nicole Scherzinger sensationally brings back Talia Dean after crowd SLAM her for shock Six Chair Challenge line-up</p>
	<p>▶ A model family! Cindy Crawford sizzles in scarlet cleavage-baring dress as she steps out with hubby Rande Gerber and daughter Kaia</p>
	<p>▶ Makeup free Kaia Gerber keeps it casual in an oversized hoodie with combat boots for breakfast in Malibu</p> <p>Last month, she made her runway debut</p>
	<p>▶ Peace time! Beyonce wears sunglasses as she looks like a proud mama while posing with mini me daughter Blue Ivy</p> <p>Family photos</p>
	<p>▶ Gladiator no more! Russell Crowe looks almost unrecognisable as he sports fuller figure for new movie role</p> <p>Not looking as honed as he used to</p>
	<p>▶ Wrong Misfits! Jaden Smith promotes his clothing line while girlfriend Odessa Adlon plugs the band instead</p> <p>She almost helped him promote his clothing line</p>
	<p>▶ Kerry Washington and a ripped Angela Bassett cuddle up at Oprah Winfrey's Gospel Brunch in Montecito</p> <p>Threw a celebrity-strewn Sunday brunch</p>
	<p>▶ 'I'll be there for her:' Scott Disick appears to CONFIRM Khloe's 'pregnancy' as he pledges to be</p>

'hands on' with assisting her during motherhood

► Pride of Ireland! Baldwin shows off her curvy figure in swimsuit as she poses with plus-size model Ashley Graham
Daughter of Alec

► Jet-set lovebirds! Sofia Richie, 19, looks chic in leather jacket as she holds hands with beau Scott Disick, 34, as they leave LA
On another vacation

► Good jeans! Karlie Kloss looks chic in double denim as she touches down in Los Angeles
Looked like a heaven-sent angel

► Arriving on her own: Jennifer Garner is seen at church before Ben Affleck amid rumours she's 'annoyed and frustrated' with him for groping accusation

► Her little fashionistas! Heidi Klum and her daughters put on stylish display as they enjoy family outing together in LA
Girls' day out

► Love Island's Olivia Buckland flaunts her ample assets in throwback bikini snap as she enjoys loved-up weekend with fiancé Alex Bowen

► Lea Thompson, 56, strips down to lingerie for Les Girls Cabaret benefitting breast cancer
Back to the Future alum put on quite a show

► Not bad for an eight-year-old! Ariel Winter's niece Skylar Gray to make \$160k for first season of Me Myself And I
New CBS comedy

► Kate Winslet dazzles in striking embellished gown as she walks hand-in-hand with husband Ned Rocknroll at NYFF premiere of Wonder Wheel

► She's bow-tiful! Tom Cruise's daughter Suri, 11, poses for fun selfies with doting mother Katie Holmes as they cheer on their team at New York ice hockey match

► **Russell Brand was just a fling for 'fussy' Jemima: Socialite's aunt says she is 'choosy' and deserves to find 'somebody nice'**
She's a 'catch'

► **One Direction mind! Cate Blanchett jokes she wants 'to see Harry Styles naked' on the Ellen DeGeneres show**
He is one of the hottest hunks in pop

► **Watch out Bella and Gigi! Sylvester Stallone's daughters Sophia, 21, and Scarlet, 15, join forces with Hamlin sisters Delilah and Amelia at shoot**

► **Lara Flynn Boyle, 47, hides behind dark sunglasses as she makes rare public appearance at Walk To Defeat ALS in Los Angeles**

► **'It isn't all yachts and parties': Margot Robbie admits celebrity life isn't as glamorous as it's cracked up to be**
Most people have the wrong idea, she says

► **Strictly Come Dancing: Debbie McGee, 58, wows the audience with her standing splits as the judges brand her 'loose of limb' and 'very bendy'**

► **Ready for Halloween! Tori Spelling and Dean McDermott take their five kids to pumpkin patch in LA**
The doting parents had a little family photoshoot

► **Where's your shirt? Topless Rachel McCord wears just a jean jacket and smalls for LA fashion shoot**
Autumn-themed fashion shoot

► **Hair today gone tomorrow! Kate Hudson shows off new flat top 'do as she touches down in NYC**
The Almost Famous star looked energized

► **Hot yoga! Charlize Theron sizzles as she shows off her delightful derriere in leggings after limb-bending session**
She is famed for her fine physique.

► **Actress Alyssa Milano sparks 'Me Too' hashtag campaign after asking other women to use it if they**

have ever been
harassed
Viral campaign

► **Sheer daring!**
Dannii Minogue
leaves VERY little to
the imagination in a
see-through lace
corset dress on the
cover of InStyle
Australia

► **They look like**
sisters! Courteney
Cox, 53, glows as
she poses with
daughter Coco
Arquette, 13, at LA
County Walk to
Defeat ALS
Teamed up for charity

► **Sienna Miller looks**
chic in denim
overalls as she
grabs breakfast
with ex-fiancé Tom
Sturridge and their
daughter Marlowe
in NYC

► **Family outing:**
Caitlyn Jenner
enjoys a day out in
Malibu with her son
Brandon Jenner and
adorable two-year-
old granddaughter
Eva
Family time

► **She gave North the**
day off! Kim
Kardashian leaves
little girl at home to
take son Saint to
Paw Patrol event
after stunning at
Jennifer Lopez's
fundraiser

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
























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Gordon Ramsay reveals his remorse over Claridges protégé who fell to his death while on cocaine (and recalls...




'Get the time booked off, that's what I'm doing!' Underwhelmed BBC newsreader


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	'I just killed Kamil - I need to be arrested': Killer's chilling 999 call after he stabbed his neighbour to...
	No crime today? Fury as at least 21 on-duty police officers including a chief superintendent take time out...
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
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
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
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Commentaries to the draft articles on

Responsibility of States for internationally wrongful acts

adopted by the
International Law Commission
at its fifty-third session (2001)

(extract from the Report of the International Law Commission on the work of its Fifty-third session,
Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2)

November 2001

2. Text of the draft articles with commentaries thereto

77. The text of the draft articles with commentaries thereto adopted by the Commission at its fifty-third session, are reproduced below:

RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

(1) These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive international law, customary and conventional.

(2) Roberto Ago, who was responsible for establishing the basic structure and orientation of the project, saw the articles as specifying ...

“the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may

generate responsibility ... [I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation.”³³

(3) Given the existence of a primary rule establishing an obligation under international law for a State, and assuming that a question has arisen as to whether that State has complied with the obligation, a number of further issues of a general character arise. These include:

- (a) The role of international law as distinct from the internal law of the State concerned in characterizing conduct as unlawful;
- (b) Determining in what circumstances conduct is to be attributed to the State as a subject of international law;
- (c) Specifying when and for what period of time there is or has been a breach of an international obligation by a State;
- (d) Determining in what circumstances a State may be responsible for the conduct of another State which is incompatible with an international obligation of the latter;
- (e) Defining the circumstances in which the wrongfulness of conduct under international law may be precluded;
- (f) Specifying the content of State responsibility, i.e. the new legal relations that arise from the commission by a State of an internationally wrongful act, in terms of cessation of the wrongful act, and reparation for any injury done;
- (g) Determining any procedural or substantive preconditions for one State to invoke the responsibility of another State, and the circumstances in which the right to invoke responsibility may be lost;
- (h) Laying down the conditions under which a State may be entitled to respond to a breach of an international obligation by taking countermeasures designed to ensure the fulfilment of the obligations of the responsible State under these articles.

This is the province of the secondary rules of State responsibility.

³³ *Yearbook ... 1970*, vol. II, p. 306, para. 66 (c).

(4) A number of matters do not fall within the scope of State responsibility as dealt with in the present articles:

First, as already noted, it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation. Nor do the articles deal with the question whether and for how long particular primary obligations are in force for a State. It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted. The same is true, *mutatis mutandis*, for other “sources” of international obligations, such as customary international law. The articles take the existence and content of the primary rules of international law as they are at the relevant time; they provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States.

Secondly, the consequences dealt with in the articles are those which flow from the commission of an internationally wrongful act as such.³⁴ No attempt is made to deal with the consequences of a breach for the continued validity or binding effect of the primary rule (e.g. the right of an injured State to terminate or suspend a treaty for material breach, as reflected in article 60 of the Vienna Convention on the Law of Treaties). Nor do the articles cover such indirect or additional consequences as may flow from the responses of international organizations to wrongful conduct. In carrying out their functions it may be necessary for international organizations to take a position on whether a State has breached an international obligation. But even where this is so, the consequences will be those determined by or within the framework of the constituent instrument of the organization, and these fall outside the scope of the articles. This is particularly the case with action of the United Nations under the Charter, which is specifically reserved by article 59.

³⁴ For the purposes of the articles, the term “internationally wrongful act” includes an omission, and extends to conduct consisting of several actions or omissions which together amount to an internationally wrongful act. See commentary to article 1, para. (1).

Thirdly, the articles deal only with the responsibility for conduct which is internationally wrongful. There may be cases where States incur obligations to compensate for the injurious consequences of conduct which is not prohibited, and may even be expressly permitted, by international law (e.g. compensation for property duly taken for a public purpose). There may also be cases where a State is obliged to restore the *status quo ante* after some lawful activity has been completed. These requirements of compensation or restoration would involve primary obligations; it would be the failure to pay compensation, or to restore the status quo which would engage the international responsibility of the State concerned. Thus for the purposes of these articles, international responsibility results exclusively from a wrongful act contrary to international law. This is reflected in the title of the articles.

Fourthly, the articles are concerned only with the responsibility of States for internationally wrongful conduct, leaving to one side issues of the responsibility of international organizations or of other non-State entities (see articles 57, 58).

(5) On the other hand the present articles are concerned with the whole field of State responsibility. Thus they are not limited to breaches of obligations of a bilateral character, e.g. under a bilateral treaty with another State. They apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole. Being general in character, they are also for the most part residual. In principle States are free, when establishing or agreeing to be bound by a rule, to specify that its breach shall entail only particular consequences and thereby to exclude the ordinary rules of responsibility. This is made clear by article 55.

(6) The present articles are divided into four Parts. Part One is entitled “The Internationally Wrongful Act of a State”. It deals with the requirements for the international responsibility of a State to arise. Part Two, “Content of the International Responsibility of a State”, deals with the legal consequences for the responsible State of its internationally wrongful act, in particular as they concern cessation and reparation. Part Three is entitled “The Implementation of the International Responsibility of a State”. It identifies the State or States which may react to an internationally wrongful act and specifies the modalities by which this may be done, including, in certain circumstances, by the taking of countermeasures as necessary to ensure cessation of the wrongful act and reparation for its consequences. Part Four contains certain general provisions applicable to the articles as a whole.

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Part One defines the general conditions necessary for State responsibility to arise. Chapter I lays down three basic principles for responsibility, from which the articles as a whole proceed. Chapter II defines the conditions under which conduct is attributable to the State. Chapter III spells out in general terms the conditions under which such conduct amounts to a breach of an international obligation of the State concerned. Chapter IV deals with certain exceptional cases where one State may be responsible for the conduct of another State not in conformity with an international obligation of the latter. Chapter V defines the circumstances precluding the wrongfulness for conduct not in conformity with the international obligations of a State.

Chapter I

General principles

Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Commentary

- (1) Article 1 states the basic principle underlying the articles as a whole, which is that a breach of international law by a State entails its international responsibility. An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both. Whether there has been an internationally wrongful act depends, first, on the requirements of the obligation which is said to have been breached and, secondly, on the framework conditions for such an act, which are set out in Part One. The term “international responsibility” covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State. The content of these new legal relations is specified in Part Two.
- (2) The Permanent Court of International Justice applied the principle set out in article 1 in a number of cases. For example in *Phosphates in Morocco*, the Permanent Court affirmed that when a State commits an internationally wrongful act against another State international

responsibility is established “immediately as between the two States”.³⁵ The International Court of Justice has applied the principle on several occasions, for example in the *Corfu Channel* case,³⁶ in the *Military and Paramilitary Activities* case,³⁷ and in the *Gabčíkovo-Nagymaros Project* case.³⁸ The Court also referred to the principle in the advisory opinions on *Reparation for Injuries*,³⁹ and on the *Interpretation of Peace Treaties (Second Phase)*,⁴⁰ in which it stated that “refusal to fulfil a treaty obligation involves international responsibility”.⁴¹ Arbitral tribunals have repeatedly affirmed the principle, for example in the *Claims of Italian Subjects Resident in Peru* cases,⁴² in the *Dickson Car Wheel Company* case,⁴³ in the *International Fisheries Company* case,⁴⁴ in the *British Claims in the Spanish Zone of Morocco* case,⁴⁵ and in the

³⁵ *Phosphates in Morocco, Preliminary Objections*, 1938, *P.C.I.J.*, Series A/B, No. 74, p. 10, at p. 28. See also *S.S. “Wimbledon”*, 1923, *P.C.I.J.*, Series A, No. 1, p. 15, at p. 30; *Factory at Chorzów, Jurisdiction*, 1927, *P.C.I.J.*, Series A, No. 9, p. 21; *Factory at Chorzów, Merits*, 1928, *P.C.I.J.*, Series A, No. 17, p. 29.

³⁶ *Corfu Channel, Merits*, *I.C.J. Reports* 1949, p. 4, at p. 23.

³⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, *I.C.J. Reports* 1986, p. 14, at pp. 142, para. 283, 149, para. 292.

³⁸ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports* 1997, p. 7, at p. 38, para. 47.

³⁹ *Reparation for Injuries Suffered in the Service of the United Nations*, *I.C.J. Reports* 1949, p. 174, at p. 184.

⁴⁰ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase*, *I.C.J. Reports* 1950, p. 221.

⁴¹ *Ibid.*, at p. 228.

⁴² Seven of these awards, rendered in 1901, reiterated that “a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents ...”: *UNRIAA*, vol. XV, pp. 399, 401, 404, 407, 408, 409, 411 (1901).

⁴³ *UNRIAA*, vol. IV, p. 669, at p. 678 (1931).

⁴⁴ *Ibid.*, vol. IV, p. 691, at p. 701 (1931).

⁴⁵ According to the arbitrator, Max Huber, it is an indisputable principle that “responsibility is the necessary corollary of rights. All international rights entail international responsibility ...”; *UNRIAA*, vol. II, p. 615 (1925), at p. 641.

Armstrong Cork Company case.⁴⁶ In the *Rainbow Warrior* case,⁴⁷ the Arbitral Tribunal stressed that “any violation by a State of any obligation, of whatever origin, gives rise to State responsibility”.⁴⁸

(3) That every internationally wrongful act of a State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place, has been widely recognized, both before⁴⁹ and since⁵⁰ article 1 was first formulated by the Commission. It is true that there were early differences of opinion over the definition of the legal relationships arising from an internationally wrongful act. One approach, associated with Anzilotti, described the legal consequences deriving from an internationally wrongful act exclusively in terms of a binding bilateral relationship thereby established between the wrongdoing State and the injured State, in which the obligation of the former State to make reparation is set against the “subjective” right of the latter State to require reparation. Another view, associated with Kelsen, started from the idea that the legal order is a coercive order and saw the authorization accorded to the injured State to apply a coercive sanction against the responsible State as the primary legal consequence flowing directly from the

⁴⁶ According to the Italian-United States Conciliation Commission, no State may “escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law”: *UNRIAA*, vol. XIV, p. 159 (1953), at p. 163.

⁴⁷ *Rainbow Warrior (New Zealand/France)*, *UNRIAA*, vol. XX, p. 217 (1990).

⁴⁸ *Ibid.*, at p. 251, para. 75.

⁴⁹ See e.g. D. Anzilotti, *Corso di diritto internazionale* (4th edn.) Padua, CEDAM, (1955) vol. I, p. 385. W. Wengler, *Völkerrecht* (Berlin, Springer, 1964) vol. I, p. 499; G. I. Tunkin, *Teoria mezhdunarodnogo prava*, *Mezhduranodnye othoshenia* (Moscow, 1970), p. 470; E. Jiménez de Aréchaga, “International Responsibility”, in M. Sørensen (ed.), *Manual of Public International Law* (London, Macmillan 1968), p. 533.

⁵⁰ See e.g. I. Brownlie, *Principles of Public International Law* (5th edn.) (Oxford, Clarendon Press, 1998), p. 435; B. Conforti, *Diritto Internazionale* (4th edn.) (Milan, Editoriale Scientifica, 1995), p. 332; P. Daillier & A. Pellet, *Droit international public (Nguyen Quoc Dinh)* (6th edn.) (Paris, L.G.D.J., 1999), p. 742; P-M. Dupuy, *Droit international public* (3rd edn.) (Paris, Précis Dalloz, 1998), p. 414; R. Wolfrum, “Internationally Wrongful Acts”, in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam, North Holland, 1995), vol. II, p. 1398.

wrongful act.⁵¹ According to this view, general international law empowered the injured State to react to a wrong; the obligation to make reparation was treated as subsidiary, a way by which the responsible State could avoid the application of coercion. A third view, which came to prevail, held that the consequences of an internationally wrongful act cannot be limited either to reparation or to a “sanction”.⁵² In international law, as in any system of law, the wrongful act may give rise to various types of legal relations, depending on the circumstances.

(4) Opinions have also differed on the question whether the legal relations arising from the occurrence of an internationally wrongful act were essentially bilateral, i.e., concerned only the relations of the responsible State and the injured State *inter se*. Increasingly it has been recognized that some wrongful acts engage the responsibility of the State concerned towards several or many States or even towards the international community as a whole. A significant step in this direction was taken by the International Court in the *Barcelona Traction* case when it noted that:

“an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”⁵³

Every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations.

Among these the Court instanced “the outlawing of acts of aggression, and of genocide, as also ... the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.⁵⁴ In later cases the Court has reaffirmed this

⁵¹ See H. Kelsen (R.W. Tucker, ed.), *Principles of International Law* (New York, Holt, Rhinehart & Winston, 1966), p. 22.

⁵² See, e.g., R. Ago, “Le délit international”, *Recueil des cours*, vol. 68, (1939/II), p. 417 at pp. 430-440; H. Lauterpacht, *Oppenheim's International Law* (8th edn.) (London, Longmans, 1955), vol. I, pp. 352-354.

⁵³ *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33.

⁵⁴ *Ibid.* at p. 32, para. 34.

idea.⁵⁵ The consequences of a broader conception of international responsibility must necessarily be reflected in the articles which, although they include standard bilateral situations of responsibility, are not limited to them.

(5) Thus the term “international responsibility” in article 1 covers the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law, and whether they are centred on obligations of restitution or compensation or also give the injured State the possibility of responding by way of countermeasures.

(6) The fact that under article 1 every internationally wrongful act of a State entails the international responsibility of that State does not mean that other States may not also be held responsible for the conduct in question, or for injury caused as a result. Under chapter II the same conduct may be attributable to several States at the same time. Under chapter IV, one State may be responsible for the internationally wrongful act of another, for example if the act was carried out under its direction and control. Nonetheless the basic principle of international law is that each State is responsible for its own conduct in respect of its own international obligations.

(7) The articles deal only with the responsibility of States. Of course, as the International Court of Justice affirmed in the *Reparation for Injuries* case, the United Nations “is a subject of international law and capable of possessing international rights and duties ... it has the capacity to maintain its rights by bringing international claims”.⁵⁶ The Court has also drawn attention to the responsibility of the United Nations for the conduct of its organs or agents.⁵⁷ It may be that

⁵⁵ See *East Timor (Portugal v. Australia)*, I.C.J. Reports 1995, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996, p. 226, at p. 258, para. 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, I.C.J. Reports 1996, p. 595, at pp. 615-616, paras. 31-32.

⁵⁶ I.C.J. Reports 1949, p. 174, at p. 179.

⁵⁷ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Reports 1999, p. 62, at pp. 88-89, para. 66.

the notion of responsibility for wrongful conduct is a basic element in the possession of international legal personality. Nonetheless special considerations apply to the responsibility of other international legal persons, and these are not covered in the articles.⁵⁸

(8) As to terminology, the French term “fait internationalement illicite” is preferable to “délit” or other similar expressions which may have a special meaning in internal law. For the same reason, it is best to avoid, in English, such terms as “tort”, “delict” or “delinquency”, or in Spanish the term “delito”. The French term “fait internationalement illicite” is better than “acte internationalement illicite”, since wrongfulness often results from omissions which are hardly indicated by the term “acte”. Moreover, the latter term appears to imply that the legal consequences are intended by its author. For the same reasons, the term “hecho internacionalmente ilícito” is adopted in the Spanish text. In the English text, it is necessary to maintain the expression “internationally wrongful act”, since the French “fait” has no exact equivalent; nonetheless, the term “act” is intended to encompass omissions, and this is made clear in article 2.

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.

Commentary

(1) Article 1 states the basic principle that every internationally wrongful act of a State entails its international responsibility. Article 2 specifies the conditions required to establish the existence of an internationally wrongful act of the State, i.e. the constituent elements of such an act. Two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time.

⁵⁸ For the position of international organizations see article 57 and commentary.

(2) These two elements were specified, for example, by the Permanent Court of International Justice in the *Phosphates in Morocco* case.⁵⁹ The Court explicitly linked the creation of international responsibility with the existence of an “act being attributable to the State and described as contrary to the treaty right[s] of another State”.⁶⁰ The International Court has also referred to the two elements on several occasions. In the *Diplomatic and Consular Staff* case,⁶¹ it pointed out that, in order to establish the responsibility of Iran ...

“[f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.”⁶²

Similarly in the *Dickson Car Wheel Company* case, the Mexico-United States General Claims Commission noted that the condition required for a State to incur international responsibility is “that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard”.⁶³

(3) The element of attribution has sometimes been described as “subjective” and the element of breach as “objective”, but the articles avoid such terminology.⁶⁴ Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be “subjective”. For example article II of the Genocide Convention states that: “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such ...”. In other cases, the standard for breach of an obligation may be “objective”, in the sense that the

⁵⁹ *Phosphates in Morocco, Preliminary Objections, 1938, P.C.I.J., Series A/B, No. 74, p. 10.*

⁶⁰ *Ibid.*, at p. 28.

⁶¹ *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 3.*

⁶² *Ibid.*, at p. 29, para. 56. Cf. p. 41, para. 90. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986, p. 14, at pp. 117-118, para. 226; Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997, p. 7, at p. 54, para. 78.*

⁶³ *UNRIIAA*, vol. IV, p. 669 (1931), at p. 678.

⁶⁴ Cf. *Yearbook ... 1973*, vol. II, p. 179, para. 1.

advertence or otherwise of relevant State organs or agents may be irrelevant. Whether responsibility is “objective” or “subjective” in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different possible standards. Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.

(4) Conduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two. Moreover it may be difficult to isolate an “omission” from the surrounding circumstances which are relevant to the determination of responsibility. For example in the *Corfu Channel* case, the International Court of Justice held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence.⁶⁵ In the *Diplomatic and Consular Staff* case, the Court concluded that the responsibility of Iran was entailed by the “inaction” of its authorities which “failed to take appropriate steps”, in circumstances where such steps were evidently called for.⁶⁶ In other cases it may be the combination of an action and an omission which is the basis for responsibility.⁶⁷

⁶⁵ *Corfu Channel, Merits*, I.C.J. Reports 1949, p. 4, at pp. 22-23.

⁶⁶ *Diplomatic and Consular Staff*, I.C.J. Reports 1980, p. 3, at pp. 31-32, paras. 63, 67. See also *Velásquez Rodríguez, Inter-Am.Ct.H.R., Series C, No. 4* (1989), para. 170: “under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions ...”; *Affaire relative à l’acquisition de la nationalité polonaise*, UNRIIAA, vol. I, p. 425 (1924).

⁶⁷ For example, under article 4 of the Hague Convention (VIII) of 18 October 1907 Relative to the Laying of Automatic Submarine Contact Mines, a neutral Power which lays mines off its coasts but omits to give the required notice to other States parties would be responsible accordingly: see J.B. Scott, *The Proceedings of the Hague Peace Conferences: The Conference of 1907* (New York, Oxford University Press, 1920), vol. I, p. 643.

(5) For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State. The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An “act of the State” must involve some action or omission by a human being or group: “States can act only by and through their agents and representatives.”⁶⁸ The question is which persons should be considered as acting on behalf of the State, i.e. what constitutes an “act of the State” for the purposes of State responsibility.

(6) In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attribution of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State under one or other of the rules set out in chapter II.

(7) The second condition for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach of an international obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations. In its judgment on jurisdiction in the *Factory at Chorzów* case, the Permanent Court of International Justice used the words “breach of an engagement”.⁶⁹ It employed the same expression in its subsequent judgment on the merits.⁷⁰ The International Court of Justice referred explicitly to these words in the *Reparation for Injuries* case.⁷¹ The Arbitral Tribunal in the *Rainbow Warrior* affair, referred

⁶⁸ *German Settlers in Poland, 1923, P.C.I.J., Series B, No. 6, at p. 22.*

⁶⁹ *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9, p. 21.*

⁷⁰ *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17, p. 29.*

⁷¹ *Reparation for Injuries Suffered in the Service of the United Nations, I.C.J. Reports 1949, p. 174, at p. 184.*

to “any violation by a State of any obligation”.⁷² In practice, terms such as “non-execution of international obligations”, “acts incompatible with international obligations”, “violation of an international obligation” or “breach of an engagement” are also used.⁷³ All these formulations have essentially the same meaning. The phrase preferred in the articles is “breach of an international obligation” corresponding as it does to the language of article 36 (2) (c) of the Statute of the International Court.

(8) In international law the idea of breach of an obligation has often been equated with conduct contrary to the rights of others. The Permanent Court of International Justice spoke of an act “contrary to the treaty right[s] of another State” in its judgment in the *Phosphates in Morocco* case.⁷⁴ That case concerned a limited multilateral treaty which dealt with the mutual rights and duties of the parties, but some have considered the correlation of obligations and rights as a general feature of international law: there are no international obligations of a subject of international law which are not matched by an international right of another subject or subjects, or even of the totality of the other subjects (the international community as a whole). But different incidents may attach to a right which is held in common by all other subjects of international law, as compared with a specific right of a given State or States. Different States may be beneficiaries of an obligation in different ways, or may have different interests in respect of its performance. Multilateral obligations may thus differ from bilateral ones, in view of the diversity of legal rules and institutions and the wide variety of interests sought to be protected by them. But whether any obligation has been breached still raises the two basic questions identified in article 2, and this is so whatever the character or provenance of the obligation breached. It is a separate question who may invoke the responsibility arising from the breach of an obligation: this question is dealt with in Part Three.⁷⁵

⁷² *Rainbow Warrior (New Zealand/France)*, UNRIAA, vol. XX, p. 217 (1990), at p. 251, para. 75.

⁷³ At the 1930 League of Nations Codification Conference, the term “any failure ... to carry out the international obligations of the State” was adopted: *Yearbook ... 1956*, vol. II, p. 225.

⁷⁴ *Phosphates in Morocco, Preliminary Objections, 1938*, P.C.I.J., Series A/B, No. 74, p. 10, at p. 28.

⁷⁵ See also article 33 (2) and commentary.

(9) Thus there is no exception to the principle stated in article 2 that there are two necessary conditions for an internationally wrongful act - conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are also sufficient. It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, “damage” to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure. Whether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract.⁷⁶

(10) A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by “fault” one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.

(11) Article 2 introduces and places in the necessary legal context the questions dealt with in subsequent chapters of Part One. Subparagraph (a) - which states that conduct attributable to the State under international law is necessary for there to be an internationally wrongful act - corresponds to chapter II, while chapter IV deals with the specific cases where one State is responsible for the internationally wrongful act of another State. Subparagraph (b) - which states that such conduct must constitute a breach of an international obligation - corresponds to the general principles stated in chapter III, while chapter V deals with cases where the wrongfulness of conduct, which would otherwise be a breach of an obligation, is precluded.

⁷⁶ For examples of analysis of different obligations, see e.g. *Diplomatic and Consular Staff, I.C.J. Reports 1980*, p. 3, at pp. 30-33, paras. 62-68; *Rainbow Warrior, UNRIIAA*, vol. XX, p. 217 (1990), at pp. 266-267, paras. 107-110; WTO, Report of the Panel, *United States - Sections 301-310 of the Trade Act of 1974*, WTO doc. WT/DS152/R, 22 December 1999, paras. 7.41 ff.

(12) In subparagraph (a), the term “attribution” is used to denote the operation of attaching a given action or omission to a State. In international practice and judicial decisions, the term “imputation” is also used.⁷⁷ But the term “attribution” avoids any suggestion that the legal process of connecting conduct to the State is a fiction, or that the conduct in question is “really” that of someone else.

(13) In subparagraph (b), reference is made to the breach of an international obligation rather than a rule or a norm of international law. What matters for these purposes is not simply the existence of a rule but its application in the specific case to the responsible State. The term “obligation” is commonly used in international judicial decisions and practice and in the literature to cover all the possibilities. The reference to an “obligation” is limited to an obligation under international law, a matter further clarified in article 3.

Article 3

Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Commentary

(1) Article 3 makes explicit a principle already implicit in article 2, namely that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned. There are two elements to this. First, an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State’s own law. Secondly and most importantly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law. An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State’s internal law - even if, under that law, the State was actually bound to act in that way.

⁷⁷ See e.g., *Diplomatic and Consular Staff, I.C.J. Reports 1980*, p. 3, at p. 29, paras. 56, 58; *Military and Paramilitary Activities, I.C.J. Reports 1986*, p. 14, at p. 51, para. 86.

(2) As to the first of these elements, perhaps the clearest judicial decision is that of the Permanent Court in the *Treatment of Polish Nationals* case⁷⁸. The Court denied the Polish Government the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the constitution of the Free City of Danzig, on the ground that:

“... according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter’s Constitution, but only on international law and international obligations duly accepted ... [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force ... The application of the Danzig Constitution may ... result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law

However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City.”⁷⁹

(3) That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled. International judicial decisions leave no doubt on that subject. In particular, the Permanent Court expressly recognized the principle in its first judgment, in the *S.S. Wimbledon*.⁸⁰ The Court rejected the argument of the German Government that the passage of the ship through the Kiel Canal would have constituted a violation of the German neutrality orders, observing that:

“... a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace ... under article 380 of the Treaty of Versailles, it was [Germany’s] definite duty to allow [the passage of the *Wimbledon* through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this article.”⁸¹

⁷⁸ *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, 1932, P.C.I.J., Series A/B, No. 44, p. 4.

⁷⁹ Ibid., at pp. 24-25. See also “*Lotus*”, 1927, P.C.I.J., Series A, No. 10, at p. 24.

⁸⁰ *S.S. “Wimbledon”*, 1923, P.C.I.J., Series A, No. 1.

⁸¹ Ibid., at pp. 29-30.

The principle was reaffirmed many times:

“... it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.”⁸²

“... it is certain that France cannot rely on her own legislation to limit the scope of her international obligations.”⁸³

“... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.”⁸⁴

A different facet of the same principle was also affirmed in the Advisory Opinions on *Exchange of Greek and Turkish Populations*⁸⁵ and *Jurisdiction of the Courts of Danzig*.⁸⁶

(4) The International Court has often referred to and applied the principle.⁸⁷ For example in the *Reparation for Injuries* case,⁸⁸ it noted that “[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible... the Member cannot

⁸² *Greco-Bulgarian “Communities”*, 1930, *P.C.I.J.*, Series B, No. 17, at p. 32.

⁸³ *Free Zones of Upper Savoy and the District of Gex*, 1930, *P.C.I.J.*, Series A, No. 24, at p. 12; *Free Zones of Upper Savoy and the District of Gex*, 1932, *P.C.I.J.*, Series A/B, No. 46, p. 96, at p. 167.

⁸⁴ *Treatment of Polish Nationals*, 1932, *P.C.I.J.*, Series A/B, No. 44, p. 4, at p. 24.

⁸⁵ *Exchange of Greek and Turkish Populations*, 1925, *P.C.I.J.*, Series B, No. 10, at p. 20.

⁸⁶ *Jurisdiction of the Courts of Danzig*, 1928, *P.C.I.J.*, Series B, No. 15, at pp. 26-27. See also the observations of Lord Finlay in *Acquisition of Polish Nationality*, 1923, *P.C.I.J.*, Series B, No. 7, at p. 26.

⁸⁷ See *Fisheries*, *I.C.J. Reports* 1951, p. 116, at p. 132; *Nottebohm, Preliminary Objection*, *I.C.J. Reports* 1953, p. 111, at p. 123; *Application of the Convention of 1902 Governing the Guardianship of Infants*, *I.C.J. Reports* 1958, p. 55, at p. 67; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, *I.C.J. Reports* 1988, p. 12, at pp. 34-35, para. 57.

⁸⁸ *Reparation for Injuries Suffered in the Service of the United Nations*, *I.C.J. Reports* 1949, p. 174, at p. 180.

contend that this obligation is governed by municipal law”. In the *ELSI* case,⁸⁹ a Chamber of the Court emphasized this rule, stating that:

“Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.”⁹⁰

Conversely, as the Chamber explained:

“... the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness ... Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.”⁹¹

The principle has also been applied by numerous arbitral tribunals.⁹²

⁸⁹ *Elettronica Sicula S.p.A. (ELSI)*, I.C.J. Reports 1989, p. 15.

⁹⁰ Ibid., at p. 51, para. 73.

⁹¹ Ibid., at p. 74, para. 124.

⁹² See e.g., the “*Alabama*” arbitration (1872), in Moore, *International Arbitrations* vol. IV, p. 4144, at pp. 4156, 4157; *Norwegian Shipowners’ Claims (Norway/United States of America)*, UNRIAA, vol. I, p. 309 (1922), at p. 331; *Tinoco case (United Kingdom/Costa Rica)*, ibid., vol. I, p. 371 (1923), at p. 386; *Shufeldt Claim*, ibid., vol. II, p. 1081 (1930), at p. 1098 (“... it is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter’s subject.”); *Wollemborg*, ibid., vol. XIV, p. 283 (1956), at p. 289; *Flegenheimer*, ibid., vol. XIV, p. 327 (1958), at p. 360.

(5) The principle was expressly endorsed in the work undertaken under the auspices of the League of Nations on the codification of State Responsibility,⁹³ as well as in the work undertaken under the auspices of the United Nations on the codification of the rights and duties of States and the law of treaties. The International Law Commission's Draft declaration on rights and duties of States, article 13, provided that:

“Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.”⁹⁴

(6) Similarly this principle was endorsed in the Vienna Convention on the Law of Treaties, article 27 of which provides that:

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.”⁹⁵

⁹³ In point I of the request for information sent to States by the Preparatory Committee for the 1930 Conference on State Responsibility it was stated:

“In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law.”

In their replies, States agreed expressly or implicitly with this principle: League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (LN doc. C.75.M.69.1929.V.), p. 16. During the debate at the Conference, States expressed general approval of the idea embodied in point I and the Third Committee of the 1930 Hague Conference adopted article 5 to the effect that “A State cannot avoid international responsibility by invoking the state of its municipal law.” (LN doc. C.351(c)M.145(c).1930.V; reproduced in *Yearbook ... 1956*, vol. II, p. 225).

⁹⁴ See G.A.Res. 375 (IV) of 6 December 1949. For the debate in the Commission, see *Yearbook ... 1949*, pp. 105-106, 150, 171. For the debate in the General Assembly see *G.A.O.R., Fourth Session, Sixth Committee*, 168th-173rd, 18-25 October 1949; 175th-183rd meetings, 27 October-3 November 1949; *G.A.O.R., Fourth Session, Plenary Meetings*, 270th meeting, 6 December 1949.

⁹⁵ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331. Article 46 of the Vienna Convention provides for the invocation of provisions of internal law regarding competence to conclude treaties in limited circumstances, viz., where the violation of such provisions “was manifest and concerned a rule of ... internal law of fundamental importance”.

(7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.

(8) As regards the wording of the rule, the formulation “The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law”, which is similar to article 5 of the draft adopted on first reading at the Hague Conference of 1930 and also to article 27 of the Vienna Convention on the Law of Treaties, has the merit of making it clear that States cannot use their internal law as a means of escaping international responsibility. On the other hand, such a formulation sounds like a rule of procedure and is inappropriate for a statement of principle. Issues of the invocation of responsibility belong to Part Three, whereas this principle addresses the underlying question of the origin of responsibility. In addition, there are many cases where issues of internal law are relevant to the existence or otherwise of responsibility. As already noted, in such cases it is international law which determines the scope and limits of any reference to internal law. This element is best reflected by saying, first, that the characterization of State conduct as internationally wrongful is governed by international law, and secondly by affirming that conduct which is characterized as wrongful under international law cannot be excused by reference to the legality of that conduct under internal law.

(9) As to terminology, in the English version the term “internal law” is preferred to “municipal law”, because the latter is sometimes used in a narrower sense, and because the Vienna Convention on the Law of Treaties speaks of “internal law”. Still less would it be appropriate to use the term “national law”, which in some legal systems refers only to the laws emanating from the central legislature, as distinct from provincial, cantonal or local authorities.

The principle in article 3 applies to all laws and regulations adopted within the framework of the State, by whatever authority and at whatever level.⁹⁶ In the French version the expression “droit interne” is preferred to “législation interne” and “loi interne”, because it covers all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions.

Chapter II

Attribution of conduct to a State

(1) In accordance with article 2, one of the essential conditions for the international responsibility of a State is that the conduct in question is attributable to the State under international law. Chapter II defines the circumstances in which such attribution is justified, i.e. when conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State.

(2) In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State.⁹⁷

⁹⁶ Cf. *LaGrand, (Germany v. United States of America), Provisional Measures, I.C.J. Reports 1999*, p. 9, at p. 16, para. 28.

⁹⁷ See e.g., I. Brownlie, *System of the Law of Nations: State Responsibility, (Part I)* (Oxford, Clarendon Press, 1983), pp. 132-166; D.D. Caron, “The Basis of Responsibility: Attribution and Other Trans-Substantive Rules”, in R. Lillich & D. Magraw (eds.), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Irvington-on-Hudson, Transnational Publishers, 1998), p. 109; L. Condorelli, “L’imputation à l’Etat d’un fait internationalement illicite: solutions classiques et nouvelles tendances”, *Recueil des cours ...*, vol. 189 (1984-VI), p. 9; H. Dipla, *La responsabilité de l’Etat pour violation des droits de l’homme - problèmes d’imputation* (Paris, Pedone, 1994); A.V. Freeman, “Responsibility of States for Unlawful Acts of Their Armed Forces”, *Recueil des cours ...*, vol. 88 (1956), p. 261; F. Przetacznik, “The International Responsibility of States for the Unauthorized Acts of their Organs”, *Sri Lanka Journal of International Law*, vol. 1 (1989), p. 151.

(3) As a corollary, the conduct of private persons is not as such attributable to the State. This was established, for example, in the *Tellini* case of 1923. The Council of the League of Nations referred to a special Committee of Jurists certain questions arising from an incident between Italy and Greece.⁹⁸ This involved the assassination on Greek territory of the Chairman and several members of an international commission entrusted with the task of delimiting the Greek-Albanian border. In reply to question five, the Committee stated that:

“The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.”⁹⁹

(4) The attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link of factual causality. As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise. But the different rules of attribution stated in chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.¹⁰⁰ In this respect there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct.

⁹⁸ League of Nations, *Official Journal*, 4th Year, No. 11 (November 1923), p. 1349.

⁹⁹ League of Nations, *Official Journal*, 5th Year, No. 4 (April 1924), p. 524. See also the *Janes* case, *UNRIIAA*, vol. IV, p. 82 (1925).

¹⁰⁰ See *United States Diplomatic and Consular Staff in Tehran*, *I.C.J. Reports* 1980, p. 3.

(5) The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State. Thus the head of State or government or the minister of foreign affairs is regarded as having authority to represent the State without any need to produce full powers.¹⁰¹ Such rules have nothing to do with attribution for the purposes of State responsibility. In principle, the State's responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs.¹⁰² Thus the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its government.

(6) In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government. But while the State remains free to determine its internal structure and functions through its own law and practice, international law has a distinct role. For example, the conduct of certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government.¹⁰³ Conduct engaged in by organs of the State in excess of their competence may also be attributed to the State under international law, whatever the position may be under internal law.¹⁰⁴

¹⁰¹ See arts. 7, 8, 46, 47, Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

¹⁰² The point was emphasized, in the context of federal States, in *LaGrand* (*Germany v. United States of America*), *Provisional Measures*, *I.C.J. Reports 1999*, p. 9, at p. 16, para. 28. It is not of course limited to federal States. See further article 5 and commentary.

¹⁰³ See commentary to article 4, para. (11); see also article 5 and commentary.

¹⁰⁴ See article 7 and commentary.

(7) The purpose of this chapter is to specify the conditions under which conduct is attributed to the State as a subject of international law for the purposes of determining its international responsibility. Conduct is thereby attributed to the State as a subject of international law and not as a subject of internal law. In internal law, it is common for the “State” to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or corporations may have separate legal personality under internal law, with separate accounts and separate liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.

(8) Chapter II consists of eight articles. Article 4 states the basic rule attributing to the State the conduct of its organs. Article 5 deals with conduct of entities empowered to exercise the governmental authority of a State, and article 6 deals with the special case where an organ of one State is placed at the disposal of another State and empowered to exercise the governmental authority of that State. Article 7 makes it clear that the conduct of organs or entities empowered to exercise governmental authority is attributable to the State even if it was carried out outside the authority of the organ or person concerned or contrary to instructions. Articles 8-11 then deal with certain additional cases where conduct, not that of a State organ or entity, is nonetheless attributed to the State in international law. Article 8 deals with conduct carried out on the instructions of a State organ or under its direction or control. Article 9 deals with certain conduct involving elements of governmental authority, carried out in the absence of the official authorities. Article 10 concerns the special case of responsibility in defined circumstances for the conduct of insurrectional movements. Article 11 deals with conduct not attributable to the State under one of the earlier articles which is nonetheless adopted by the State, expressly or by conduct, as its own.

(9) These rules are cumulative but they are also limitative. In the absence of a specific undertaking or guarantee (which would be a *lex specialis*¹⁰⁵), a State is not responsible for the conduct of persons or entities in circumstances not covered by this chapter. As the

¹⁰⁵ See article 55 and commentary.

Iran-United States Claims Tribunal has affirmed, “in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State”.¹⁰⁶ This follows already from the provisions of article 2.

Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Commentary

- (1) Paragraph 1 of article 4 states the first principle of attribution for the purposes of State responsibility in international law - that the conduct of an organ of the State is attributable to that State. The reference to a “State organ” covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State: this is made clear by the final phrase.
- (2) Certain acts of individuals or entities which do not have the status of organs of the State may be attributed to the State in international law, and these cases are dealt with in later articles of this chapter. But the rule is nonetheless a point of departure. It defines the core cases of attribution, and it is a starting point for other cases. For example, under article 8 conduct which is authorized by the State, so as to be attributable to it, must have been authorized by an organ of the State, either directly or indirectly.
- (3) That the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognized in international judicial decisions. In the *Moses* case, for example, a decision of a Mexico-United States Mixed Claims Commission, Umpire Lieber said: “An

¹⁰⁶ *Yeager v. Islamic Republic of Iran* (1987) 17 *Iran-U.S.C.T.R.* 92, at pp. 101-2.

officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority”.¹⁰⁷ There have been many statements of the principle since then.¹⁰⁸

(4) The replies by Governments to the Preparatory Committee for the 1930 Conference for the Codification of International Law¹⁰⁹ were unanimously of the view that the actions or omissions of organs of the State must be attributed to it. The Third Committee of the Conference adopted unanimously on first reading an article 1, which provided that international responsibility shall be incurred by a State as a consequence of “any failure on the part of its organs to carry out the international obligations of the State ...”¹¹⁰

(5) The principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility. It goes without saying that there is no category of organs specially designated for the commission of internationally wrongful acts, and virtually any State organ may be the author of such an act. The diversity of international obligations does not permit any general distinction between organs which can commit internationally wrongful acts and those which cannot. This is reflected in the closing words of paragraph 1, which clearly reflect the rule of international law in the matter.

(6) Thus the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of

¹⁰⁷ Moore, *International Arbitrations*, vol. III, p. 3127 (1871), at p. 3129.

¹⁰⁸ See e.g. *Claims of Italian Nationals Resident in Peru*, UNRIAA, vol. XV, p. 399 (1901) (*Chiessa* claim); p. 401 (*Sessarego* claim); p. 404 (*Sanguinetti* claim); p. 407 (*Vercelli* claim); p. 408 (*Queirolo* claim); p. 409 (*Roggero* claim); p. 411 (*Miglia* claim); *Salvador Commercial Company*, *ibid.*, vol. XV, p. 455 (1902), at p. 477; *Finnish Shipowners (Great Britain/Finland)*, UNRIAA, vol. III, p. 1479 (1934), at p. 1501.

¹⁰⁹ League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (Doc. C.75.M.69.1929.V.), pp. 25, 41, 52; *Supplement to Volume III: Replies made by the Governments to the Schedule of Points; Replies of Canada and the United States of America* (Doc C.75(a)M.69(a).1929.V.), pp. 2-3, 6.

¹¹⁰ Reproduced in *Yearbook ... 1956*, vol. II, p. 225, Annex 3.

whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs. Thus, in the *Salvador Commercial Company* case, the Tribunal said that:

“... a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.”¹¹¹

The International Court has also confirmed the rule in categorical terms. In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, it said:

“According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule... is of a customary character...”¹¹²

In that case the Court was principally concerned with decisions of State courts, but the same principle applies to legislative and executive acts.¹¹³ As the Permanent Court said in *Certain German Interests in Polish Upper Silesia (Merits)* ...

¹¹¹ UNRIAA, vol. XV, p. 455 (1902), at p. 477. See also *Chattin* case, UNRIAA, vol. IV, p. 282 (1927), at p. 285-86; *Dispute concerning the interpretation of article 79 of the Treaty of Peace*, UNRIAA, vol. XIII, p. 389 (1955), at p. 438.

¹¹² *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Reports 1999, p. 62, at p. 87, para. 62, referring to the Draft Articles on State Responsibility, art. 6, now embodied in art. 4.

¹¹³ As to legislative acts see e.g. *German Settlers in Poland*, 1923, P.C.I.J., Series B, No. 6, at p. 35-36; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, 1932, P.C.I.J., Series A/B, No. 44, p. 4, at pp. 24-25; *Phosphates in Morocco, Preliminary Objections*, 1938, P.C.I.J., Series A/B, No. 74, p. 10, at pp. 25-26; *Rights of Nationals of the United States of America in Morocco*, I.C.J. Reports 1952, p. 176, at pp. 193-194. As to executive acts see e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14; *Elettronica Sicula S.p.A. (ELSI)*, I.C.J. Reports 1989, p. 15. As to judicial acts see e.g. “*Lotus*”, 1927, P.C.I.J., Series A, No. 10, at p. 24; *Jurisdiction of the Courts of Danzig*, 1928, P.C.I.J., Series B, No. 15, at p. 24; *Ambatielos*, Merits, I.C.J. Reports 1953, p. 10, at pp. 21-22. In some cases, the conduct in question may involve both executive and judicial acts; see e.g. *Application of the Convention of 1902 Governing the Guardianship of Infants*, I.C.J. Reports 1958, p. 55, at p. 65.

“From the standpoint of International Law and of the Court which is its organ, municipal laws ... express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.”¹¹⁴

Thus article 4 covers organs, whether they exercise “legislative, executive, judicial or any other functions”. This language allows for the fact that the principle of the separation of powers is not followed in any uniform way, and that many organs exercise some combination of public powers of a legislative, executive or judicial character. Moreover the term is one of extension, not limitation, as is made clear by the words “or any other functions”.¹¹⁵ It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as “commercial” or as “*acta iure gestionis*”. Of course the breach by a State of a contract does not as such entail a breach of international law.¹¹⁶ Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4,¹¹⁷ and it might in certain circumstances amount to an internationally wrongful act.¹¹⁸

(7) Nor is any distinction made at the level of principle between the acts of “superior” and “subordinate” officials, provided they are acting in their official capacity. This is expressed in the phrase “whatever position it holds in the organization of the State” in article 4. No doubt

¹¹⁴ *Certain German Interests in Polish Upper Silesia, Merits, 1926, P.C.I.J., Series A, No. 7*, at p. 19.

¹¹⁵ These functions might involve, e.g., the giving of administrative guidance to the private sector. Whether such guidance involves a breach of an international obligation may be an issue, but as “guidance” it is clearly attributable to the State. See, e.g., G.A.T.T., *Japan - Trade in Semi-conductors*, Panel Report of 24 March 1988, paras. 110-111; WTO, *Japan - Measures affecting Consumer Photographic Film and Paper*, Panel Report WT/DS44, paras. 10.12-10.16.

¹¹⁶ See article 3 and commentary.

¹¹⁷ See e.g. the decisions of the European Court of Human Rights in the *Swedish Engine Drivers' Union Case, E.C.H.R., Series A, No. 20* (1976), at p. 14; and *Schmidt and Dahlström, E.C.H.R., Series A, No. 21* (1976), at p. 15.

¹¹⁸ The irrelevance of the classification of the acts of State organs as *iure imperii* or *iure gestionis* was affirmed by all those members of the Sixth Committee who responded to a specific question on this issue from the Commission: see *Report of the I.L.C ... 1998 (A/53/10)*, para. 35.

lower level officials may have a more restricted scope of activity and they may not be able to make final decisions. But conduct carried out by them in their official capacity is nonetheless attributable to the State for the purposes of article 4. Mixed commissions after the Second World War often had to consider the conduct of minor organs of the State, such as administrators of enemy property, mayors and police officers, and consistently treated the acts of such persons as attributable to the State.¹¹⁹

(8) Likewise, the principle in article 4 applies equally to organs of the central government and to those of regional or local units. This principle has long been recognized. For example the Franco-Italian Conciliation Commission in the *Heirs of the Duc de Guise* case said:

“For the purposes of reaching a decision in the present case it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian Republic.”¹²⁰

This principle was strongly supported during the preparatory work for the Conference for the Codification of International Law of 1930. Governments were expressly asked whether the State became responsible as a result of “[a]cts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, etc.)”. All answered in the affirmative.¹²¹

¹¹⁹ See, e.g., the *Currie* case, *UNRIAA*, vol. XIV, p. 21 (1954), at p. 24; *Dispute concerning the interpretation of article 79 of the Italian Peace Treaty*, *UNRIAA*, vol. XIII, p. 389 (1955), at pp. 431-432; *Mossé* case, *ibid.*, vol. XIII, p. 486 (1953), at pp. 492-493. For earlier decisions see the *Roper* case, *UNRIAA*, vol. IV, p. 145 (1927); *Massey*, *ibid.*, vol. IV, p. 155 (1927); *Way*, *ibid.*, vol. IV, p. 391 (1928), at p. 400; *Baldwin*, *UNRIAA*, vol. VI, p. 328 (1933). Cf. also the consideration of the requisition of a plant by the Mayor of Palermo in *Elettronica Sicula S.p.A. (ELSI)*, *I.C.J. Reports 1989*, p. 15, e.g. at p. 50, para. 70.

¹²⁰ *UNRIAA*, vol. XIII, p. 150 (1951), at p. 161. For earlier decisions, see e.g. the *Pieri Dominique and Co.* case, *UNRIAA*, vol. X, p. 139 (1905), at 156.

¹²¹ League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (Doc. C.75.M.69.1929.V.), p. 90; *Supplement to Vol. III: Replies made by the Governments to the Schedule of Points: Replies of Canada and the United States of America* (Doc. C.75(a).M.69(a). 1929.V.), pp. 3, 18.

(9) It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations. The award in the *Montijo* case is the starting point for a consistent series of decisions to this effect.¹²² The France/Mexico Claims Commission in the *Pellat* case reaffirmed "the principle of the international responsibility ... of a federal State for all the acts of its separate States which give rise to claims by foreign States" and noted specially that such responsibility "...cannot be denied, not even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law".¹²³ That rule has since been consistently applied. Thus for example in the *LaGrand* case, the International Court said:

"Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States..."¹²⁴

¹²² See Moore, *International Arbitrations*, vol. II, p. 1421 (1875), at p. 1440. See also *De Brissot and others*, Moore, *International Arbitrations*, vol. III, pp. 2967 (1855), at pp. 2970-2971; *Pieri Dominique and Co.*, *UNRIAA*, vol. X, p. 139 (1905), at pp. 156-157; *Davy* case, *UNRIAA*, vol. IX, p. 467 (1903), at p. 468; *Janes* case, *UNRIAA*, vol. IV, p. 82 (1925), at p. 86; *Swinney*, *ibid.* vol. IV, p. 98 (1925), at p. 101; *Quintanilla*, *ibid.*, vol. IV, p. 101 (1925), at p. 103; *Youmans*, *ibid.*, vol. IV, p. 110 (1925), at p. 116; *Mallén*, *ibid.*, vol. IV, p. 173 (1925), at p. 177; *Venable*, *ibid.*, vol. IV, p. 218 (1925), at p. 230; *Tribolet*, *ibid.*, vol. IV, p. 598 (1925), at p. 601.

¹²³ *UNRIAA*, vol. V, p. 534 (1929), at p. 536.

¹²⁴ *LaGrand (Germany v. United States of America)*, *Provisional Measures*, *I.C.J. Reports* 1999, p. 9, at p. 16, para. 28. See also the judgment of 27 June 2001, para. 81.

(10) The reasons for this position are reinforced by the fact that federal States vary widely in their structure and distribution of powers, and that in most cases the constituent units have no separate international legal personality of their own (however limited), nor any treaty-making power. In those cases where the constituent unit of a federation is able to enter into international agreements on its own account,¹²⁵ the other party may well have agreed to limit itself to recourse against the constituent unit in the event of a breach. In that case the matter will not involve the responsibility of the federal State and will fall outside the scope of the present articles. Another possibility is that the responsibility of the federal State under a treaty may be limited by the terms of a federal clause in the treaty.¹²⁶ This is clearly an exception to the general rule, applicable solely in relations between the States parties to the treaty and in the matters which the treaty covers. It has effect by virtue of the *lex specialis* principle, dealt with in article 55.

(11) Paragraph 2 explains the relevance of internal law in determining the status of a State organ. Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of “organs”. In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an “organ”, internal law will not itself perform the task of classification. Even if it does so, the term “organ” used in internal law may have a special meaning, and not the very broad meaning it has under article 4. For example, under some legal systems the term “government” refers only to bodies at the highest level such as the head of State and the cabinet of ministers. In others, the police have a special status, independent of the executive; this cannot mean that for international law purposes they are not organs of the

¹²⁵ See e.g. arts. 56 (3), 172 (3) of the Constitution of the Swiss Confederation, 18 April 1999.

¹²⁶ See e.g. Convention for the Protection of the World Cultural and Natural Heritage, Paris, United Nations, *Treaty Series*, vol. 1037, p. 151, art. 34.

State.¹²⁷ Accordingly, a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word “includes” in paragraph 2.

(12) The term “person or entity” is used in article 4, paragraph 2, as well as in articles 5 and 7. It is used to include in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority, etc. The term “entity” is used in a similar sense in the draft articles on Jurisdictional immunities of States and their property, adopted in 1991.¹²⁸

(13) Although the principle stated in article 4 is clear and undoubted, difficulties can arise in its application. A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State. The distinction between unauthorized conduct of a State organ and purely private conduct has been clearly drawn in international arbitral decisions. For example, the award of the United States/Mexico General Claims Commission in the *Mallén* case (1927) involved, first, the act of an official acting in a private capacity, and secondly, another act committed by the same official in his official capacity, although in an abusive way.¹²⁹ The latter action was, and the former was not, held attributable to the State. The French-Mexican Claims Commission in the *Caire* case excluded responsibility only in cases where “the act had no connexion with the official function and was, in fact, merely the act of a private individual”.¹³⁰ The case of purely private conduct should not be confused with that of an organ functioning as such but acting *ultra*

¹²⁷ See e.g. the *Church of Scientology* case in the German Bundesgerichtshof, Judgment of 26 September 1978, *VI ZR 267/76*, *N.J.W.* 1979, p. 1101; *I.L.R.*, vol. 65, p. 193; *Propend Finance Pty. Ltd. v. Sing*, (1997) *I.L.R.*, vol. 111, p. 611 (C.A., England). These were State immunity cases, but the same principle applies in the field of State responsibility.

¹²⁸ *Yearbook... 1991*, vol. II Part Two, pp. 14-18.

¹²⁹ *UNRIAA*, vol. IV, p. 173 (1927), at p. 175.

¹³⁰ *UNRIAA*, vol. V, p. 516 (1929), at p. 531. See also the *Bensley* case (1850), in Moore, *International Arbitrations*, vol. III, p. 3018 (“a wanton trespass... under no color of official proceedings, and without any connexion with his official duties”); *Castelains*, Moore, *International Arbitrations*, vol. III, pp. 2999 (1880). See further article 7 and commentary.

vires or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State: this principle is affirmed in article 7.¹³¹ In applying this test, of course, each case will have to be dealt with on the basis of its own facts and circumstances.

Article 5

Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Commentary

- (1) Article 5 deals with the attribution to the State of conduct of bodies which are not State organs in the sense of article 4, but which are nonetheless authorized to exercise governmental authority. The article is intended to take account of the increasingly common phenomenon of para-statal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.
- (2) The generic term “entity” reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine. In one case before the Iran-United States Claims Tribunal, an autonomous foundation established by the

¹³¹ See further commentary to article 7, paragraph (7).

State held property for charitable purposes under close governmental control; its powers included the identification of property for seizure. It was held that it was a public and not a private entity, and therefore within the Tribunal's jurisdiction; with respect to its administration of allegedly expropriated property, it would in any event have been covered by article 5.¹³²

(3) The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control - these are not decisive criteria for the purpose of attribution of the entity's conduct to the State.

Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.

(4) Para-statal entities may be considered a relatively modern phenomenon, but the principle embodied in article 5 has been recognized for some time. For example the replies to the request for information made by the Preparatory Committee for the 1930 Codification Conference indicated strong support from some governments for the attribution to the State of the conduct of autonomous bodies exercising public functions of an administrative or legislative character. The German Government, for example, asserted that:

“when, by delegation of powers, bodies act in a public capacity, e.g., police an area ... the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies”.¹³³

¹³² *Hyatt International Corporation v. Government of the Islamic Republic of Iran* (1985) 9 *Iran-U.S.C.T.R.* 72, at pp. 88-94.

¹³³ League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (Doc. C.75.M.69.1929.V.), p. 90. The German Government noted that these remarks would extend to the situation where “the State, as an exceptional measure, invests private organizations with public powers and duties or authorities [sic] them to exercise sovereign rights, as in the case of private railway companies permitted to maintain a police force”; *ibid.*

The Preparatory Committee accordingly prepared the following Basis of Discussion, though the Third Committee of the Conference was unable in the time available to examine it:

“A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such ... autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State”.¹³⁴

(5) The justification for attributing to the State under international law the conduct of “para-statal” entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling-stock).

(6) Article 5 does not attempt to identify precisely the scope of “governmental authority” for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as “governmental” depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.

(7) The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority. This is to be distinguished from situations where an entity acts under the direction or control of the State, which are covered by article 8, and those where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 9. For the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State. On the other hand article 5 does not extend to cover,

¹³⁴ *Ibid.*, p. 92.

for example, situations where internal law authorizes or justifies certain conduct by way of self-help or self-defence; i.e. where it confers powers upon or authorizes conduct by citizens or residents generally. The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category.

Article 6

Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Commentary

- (1) Article 6 deals with the limited and precise situation in which an organ of a State is effectively put at the disposal of another State so that the organ may temporarily act for its benefit and under its authority. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.
- (2) The words “placed at the disposal of” in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving and not of the sending State. The notion of an organ “placed at the disposal of” the receiving State is a specialized one, implying that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed. In performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State. Thus article 6 is not concerned with ordinary situations of interstate cooperation or collaboration, pursuant to treaty or otherwise.¹³⁵

¹³⁵ Thus conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to Albania: *Xhavara & others v. Italy & Albania*, Application Nos. 39473-98, E.C.H.R., decision of 11 January 2001. Conversely conduct of Turkey taken in the context of the E.C.-Turkey customs union was still attributable to Turkey: see WTO, *Turkey - Restrictions on Imports of Textile and Clothing Products*, Panel Report, WT/DS34/R, 31 May 1999, paras. 9.33-9.44.

(3) Examples of situations that could come within this limited notion of a State organ “placed at the disposal” of another State might include a section of the health service or some other unit placed under the orders of another country to assist in overcoming an epidemic or natural disaster, or judges appointed in particular cases to act as judicial organs of another State. On the other hand, mere aid or assistance offered by organs of one State to another on the territory of the latter is not covered by article 6. For example armed forces may be sent to assist another State in the exercise of the right of collective self-defence or for other purposes. Where the forces in question remain under the authority of the sending State, they exercise elements of the governmental authority of that State and not of the receiving State. Situations can also arise where the organ of one State acts on the joint instructions of its own and another State, or there may be a single entity which is a joint organ of several States. In these cases, the conduct in question is attributable to both States under other articles of this chapter.¹³⁶

(4) Thus what is crucial for the purposes of article 6 is the establishment of a functional link between the organ in question and the structure or authority of the receiving State. The notion of an organ “placed at the disposal” of another State excludes the case of State organs, sent to another State for the purposes of the former State or even for shared purposes, which retain their own autonomy and status: for example, cultural missions, diplomatic or consular missions, foreign relief or aid organizations. Also excluded from the ambit of article 6 are situations in which functions of the “beneficiary” State are performed without its consent, as when a State placed in a position of dependence, territorial occupation or the like is compelled to allow the acts of its own organs to be set aside and replaced to a greater or lesser extent by those of the other State.¹³⁷

(5) There are two further criteria that must be met for article 6 to apply. First, the organ in question must possess the status of an organ of the sending State; and secondly its conduct must involve the exercise of elements of the governmental authority of the receiving State. The first

¹³⁶ See also article 47 and commentary.

¹³⁷ For the responsibility of a State for directing, controlling or coercing the internationally wrongful act of another see articles 17 and 18 and commentaries.

of these conditions excludes from the ambit of article 6 the conduct of private entities or individuals which have never had the status of an organ of the sending State. For example, experts or advisors placed at the disposal of a State under technical assistance programs usually do not have the status of organs of the sending State. The second condition is that the organ placed at the disposal of a State by another State must be “acting in the exercise of elements of the governmental authority” of the receiving State. There will only be an act attributable to the receiving State where the conduct of the loaned organ involves the exercise of the governmental authority of that State. By comparison with the number of cases of cooperative action by States in fields such as mutual defence, aid and development, article 6 covers only a specific and limited notion of “transferred responsibility”. Yet in State practice the situation is not unknown.

(6) In the *Chevreau* case,¹³⁸ a British consul in Persia, temporarily placed in charge of the French consulate, lost some papers entrusted to him. On a claim being brought by France, Arbitrator Beichmann held that “the British Government cannot be held responsible for negligence by its Consul in his capacity as the person in charge of the Consulate of another Power.”¹³⁹ It is implicit in the Arbitrator’s finding that the agreed terms on which the British Consul was acting contained no provision allocating responsibility for the consul’s acts. If a third State had brought a claim, the proper respondent in accordance with article 6 would have been the State on whose behalf the conduct in question was carried out.

(7) Similar issues were considered by the European Commission of Human Rights in two cases relating to the exercise by Swiss police in Liechtenstein of “delegated” powers.¹⁴⁰ At the relevant time Liechtenstein was not a party to the European Convention, so that if the conduct was attributable only to Liechtenstein no breach of the Convention could have occurred. The Commission held the case admissible, on the basis that under the treaty governing the relations between Switzerland and Liechtenstein of 1923, Switzerland exercised its own customs and immigration jurisdiction in Liechtenstein, albeit with the latter’s consent and in their mutual

¹³⁸ *UNRIIAA*, vol. II, p. 1113 (1931).

¹³⁹ *Ibid.*, at p. 1141.

¹⁴⁰ *X and Y v. Switzerland*, (Joined Apps. 7289/75 and 7349/76), (1977) 9 *D.R.* 57; 20 *Yearbook E.C.H.R.*, 372, at pp. 402-406.

interest. The officers in question were governed exclusively by Swiss law and were considered to be exercising the public authority of Switzerland. In that sense, they were not “placed at the disposal” of the receiving State.¹⁴¹

(8) A further, long-standing example, of a situation to which article 6 applies is the Judicial Committee of the Privy Council, which has acted as the final court of appeal for a number of independent States within the Commonwealth. Decisions of the Privy Council on appeal from an independent Commonwealth State will be attributable to that State and not to the United Kingdom. The Privy Council’s role is paralleled by certain final courts of appeal acting pursuant to treaty arrangements.¹⁴² There are many examples of judges seconded by one State to another for a time: in their capacity as judges of the receiving State, their decisions are not attributable to the sending State, even if it continues to pay their salaries.

(9) Similar questions could also arise in the case of organs of international organizations placed at the disposal of a State and exercising elements of that State’s governmental authority. This is even more exceptional than the interstate cases to which article 6 is limited. It also raises difficult questions of the relations between States and international organizations, questions which fall outside the scope of these Articles. Article 57 accordingly excludes from the ambit of the articles all questions of the responsibility of international organizations or of a State for the acts of an international organization. By the same token, article 6 does not concern those cases where, for example, accused persons are transferred by a State to an international institution pursuant to treaty.¹⁴³ In cooperating with international institutions in such a case, the State concerned does not assume responsibility for their subsequent conduct.

¹⁴¹ See also *Drozdz and Janousek v. France and Spain*, E.C.H.R., Series A, No. 240 (1992) at paras. 96, 110. See also *Comptroller and Auditor-General v. Davidson*, (1996) I.L.R., vol. 104, p. 526 (Court of Appeal, New Zealand), at pp. 536-537 (Cooke, P.), and at pp. 574-576 (Richardson, J.). An appeal to the Privy Council on other grounds was dismissed: I.L.R., vol. 108, p. 622.

¹⁴² E.g. the Agreement between Nauru and Australia relating to Appeals to the High Court of Australia from the Supreme Court of Nauru, United Nations, *Treaty Series*, vol. 1216, p. 151.

¹⁴³ See, e.g., Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, art. 89.

Article 7

Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Commentary

- (1) Article 7 deals with the important question of unauthorized or *ultra vires* acts of State organs or entities. It makes it clear that the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions.
- (2) The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question.¹⁴⁴ Any other rule would contradict the basic principle stated in article 3, since otherwise a State could rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it.
- (3) The rule evolved in response to the need for clarity and security in international relations. Despite early equivocal statements in diplomatic practice and by arbitral tribunals,¹⁴⁵ State practice came to support the proposition, articulated by the British Government in response to an Italian request, that “all Governments should always be held responsible for all acts committed

¹⁴⁴ See e.g. the “Star and Herald” controversy, Moore, *Digest*, vol. VI, p. 775.

¹⁴⁵ In a number of early cases, international responsibility was attributed to the State for the conduct of officials without making it clear whether the officials had exceeded their authority: see, e.g., “*The Only Son*”, Moore, *International Arbitrations*, vol. IV, pp. 3404, at pp. 3404-3405; “*The William Lee*”, *ibid*, vol. IV, p. 3405; the *Donougho*, Moore, *International Arbitrations*, vol. III, p. 3012 (1876). Where the question was expressly examined tribunals did not consistently apply any single principle: see, e.g., *Collector of Customs: Lewis’s Case*, *ibid.*, vol. III, p. 3019; the *Gadino* case, *UNRIAA*, vol. XV, p. 414 (1901); “*The Lacaze*”, de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. II, p. 290, at pp. 297-298; “*The William Yeaton*”, Moore, *International Arbitrations*, vol. III, p. 2944, at p. 2946.

by their agents by virtue of their official capacity”.¹⁴⁶ As the Spanish Government pointed out: “If this were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received.”¹⁴⁷ At this time the United States supported “a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but of their apparent authority”.¹⁴⁸ It is probable that the different formulations had essentially the same effect, since acts falling outside the scope of both real and apparent authority would not be performed “by virtue of ... official capacity”. In any event, by the time of the Hague Codification Conference in 1930, a majority of States responding to the Preparatory Committee’s request for information were clearly in favour of the broadest formulation of the rule, providing for attribution to the State in the case of “[a]cts of officials in the national territory in their public capacity (*actes de fonction*) but exceeding their authority”.¹⁴⁹ The Basis of Discussion prepared by the Committee reflected this view. The Third Committee of the Conference adopted an article on first reading in the following terms:

“International responsibility is... incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State”¹⁵⁰

¹⁴⁶ For the opinions of the British and Spanish Governments given in 1898 at the request of Italy in respect of a dispute with Peru see *Archivio del Ministero degli Affari esteri italiano*, serie politica P, No. 43.

¹⁴⁷ Note verbale by Duke Almodóvar del Rio, 4 July 1898, *ibid.*

¹⁴⁸ “American Bible Society” incident, statement of United States Secretary of State, 17 August 1885, Moore, *Digest*, vol. VI, p. 743; “Shine and Milligen”, Hackworth, *Digest*, vol. V, p. 575; “Miller”, Hackworth, *Digest*, vol. V, pp. 570-571.

¹⁴⁹ Point V, No. 2 (b), League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee* (Doc. C.75.M.69.1929.V.), Vol. III, p. 74; and *Supplement to Vol. III* (Doc. C.75 (a). M.69(a)1929.V.), pp. 3 and 17.

¹⁵⁰ *Ibid.*, p. 238. For a more detailed account of the evolution of the modern rule see *Yearbook ... 1975*, vol. II, pp. 61-70.

(4) The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists.¹⁵¹ It is confirmed, for example, in article 91 of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949,¹⁵² which provides that: “A Party to the conflict ... shall be responsible for all acts by persons forming part of its armed forces”: this clearly covers acts committed contrary to orders or instructions. The commentary notes that article 91 was adopted by consensus and “correspond[s] to the general principles of law on international responsibility”.¹⁵³

(5) A definitive formulation of the modern rule is found in the *Caire* case. The case concerned the murder of a French national by two Mexican officers who, after failing to extort money, took Caire to the local barracks and shot him. The Commission held ...

“that the two officers, even if they are deemed to have acted outside their competence ... and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.”¹⁵⁴

(6) International human rights courts and tribunals have applied the same rule. For example the Inter-American Court of Human Rights in the *Velásquez Rodríguez Case* said ...

“This conclusion [of a breach of the Convention] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts

¹⁵¹ For example, the 1961 revised draft by Special Rapporteur F.V. García Amador provided that “an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity”. *Yearbook ... 1961*, vol. II, p. 53.

¹⁵² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), United Nations, *Treaty Series*, vol. 1125, p. 3.

¹⁵³ International Committee of the Red Cross, *Commentary on the Additional Protocols* (Geneva, 1987), pp. 1053-1054.

¹⁵⁴ *UNRIAA*, vol. p. 516 (1929), at p. 531. For other statements of the rule see *Maal*, *UNRIAA*, vol. X, p. 730 (1903) at pp. 732-733; *La Masica*, *UNRIAA*, vol. XI, p. 549 (1916), at p. 560; *Youmans*, *UNRIAA*, vol. IV, p. 110 (1916), at p. 116; *Mallen*, *ibid.*, vol. IV (1925), p. 173, at

of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.”¹⁵⁵

(7) The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been “carried out by persons cloaked with governmental authority.”¹⁵⁶

(8) The problem of drawing the line between unauthorized but still “official” conduct, on the one hand, and “private” conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression “if the organ, person or entity acts in that capacity” in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State.¹⁵⁷ In short, the question is whether they were acting with apparent authority.

p. 177; *Stephens*, *ibid*, vol. IV, p. 265 (1927), at pp. 267-268; Way, *ibid*, vol. IV, p. 391 (1925), at pp. 400-01. The decision of the United States Court of Claims in *Royal Holland Lloyd v. United States*, 73 Ct. Cl. 722 (1931); A.D.P.I.L.C, vol 6, p. 442 is also often cited.

¹⁵⁵ *Inter-Am.Ct.H.R., Series C, No. 4* (1989), at para. 170; 95 *I.L.R.* 232, at p. 296.

¹⁵⁶ *Petrolane, Inc. v. Islamic Republic of Iran* (1991) 27 *Iran-U.S.C.T.R.* 64, at p. 92. See commentary to article 4, paragraph (13).

¹⁵⁷ One form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction. The Articles are not concerned with questions that would then arise as to the validity of the transaction (cf. Vienna Convention on the Law of Treaties, art. 50). So far as responsibility for the corrupt conduct is concerned, various

(9) As formulated, article 7 only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, i.e. only to those cases of attribution covered by articles 4, 5 and 6. Problems of unauthorized conduct by other persons, groups or entities give rise to distinct problems, which are dealt with separately under articles 8, 9 and 10.

(10) As a rule of attribution, article 7 is not concerned with the question whether the conduct amounted to a breach of an international obligation. The fact that instructions given to an organ or entity were ignored, or that its actions were *ultra vires*, may be relevant in determining whether or not the obligation has been breached, but that is a separate issue.¹⁵⁸ Equally, article 7 is not concerned with the admissibility of claims arising from internationally wrongful acts committed by organs or agents acting *ultra vires* or contrary to their instructions. Where there has been an unauthorized or invalid act under local law and as a result a local remedy is available, this will have to be resorted to, in accordance with the principle of exhaustion of local remedies, before bringing an international claim.¹⁵⁹

Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Commentary

(1) As a general principle, the conduct of private persons or entities is not attributable to the State under international law. Circumstances may arise, however, where such conduct is

situations could arise which it is not necessary to deal with expressly in the present Articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party, which would be properly resolved under article 7.

¹⁵⁸ See *Elettronica Sicula S.p.A. (ELSI)*, I.C.J. Reports 1989, p. 15, esp. at pp. 52, 62 and 74.

¹⁵⁹ See further article 44 (b) and commentary.

nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State. Article 8 deals with two such circumstances. The first involves private persons acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons act under the State's direction or control.¹⁶⁰ Bearing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account in both cases the existence of a real link between the person or group performing the act and the State machinery.

(2) The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence.¹⁶¹ In such cases it does not matter that the person or persons involved are private individuals nor whether their conduct involves "governmental activity". Most commonly cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighbouring countries, or who are instructed to carry out particular missions abroad.

(3) More complex issues arise in determining whether conduct was carried out "under the direction or control" of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.

¹⁶⁰ Separate issues are raised where one State engages in internationally wrongful conduct at the direction or under the control of another State: see article 17 and commentary, and especially para. (7) for the meaning of the words "direction" and "control" in various languages..

¹⁶¹ See, e.g., the *Zafiro* case, *UNRIAA*, vol. VI, p. 160 (1925); *Stephens*, *UNRIAA*, vol. IV, p. 265 (1927), at p. 267; *Lehigh Valley Railroad Company, and others (U.S.A.) v. Germany (Sabotage Cases)*: "Black Tom" and "Kingsland" incidents, *UNRIAA*, vol. VIII, p. 84 (1930); and *UNRIAA*, vol. VIII, p. 225 (1939), at p. 458.

(4) The degree of control which must be exercised by the State in order for the conduct to be attributable to it was a key issue in the *Military and Paramilitary* case.¹⁶² The question was whether the conduct of the *contras* was attributable to the United States so as to hold the latter generally responsible for breaches of international humanitarian law committed by the *contras*. This was analysed by the Court in terms of the notion of “control”. On the one hand, it held that the United States was responsible for the “planning, direction and support” given by United States to Nicaraguan operatives.¹⁶³ But it rejected the broader claim of Nicaragua that all the conduct of the *contras* was attributable to the United States by reason of its control over them. It concluded that:

“[D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf ... All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”¹⁶⁴

¹⁶² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14.

¹⁶³ Ibid., p. 51, para. 86.

¹⁶⁴ Ibid., pp. 62 and 64-65, paras. 109 and 115. See also the concurring opinion of Judge Ago, ibid., p. 189, para. 17.

Thus while the United States was held responsible for its own support for the *contras*, only in certain individual instances were the acts of the *contras* themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State.

(5) The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has also addressed these issues.¹⁶⁵ In *Prosecutor v. Tadić*, the Chamber stressed that:

“The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.”¹⁶⁶

The Appeals Chamber held that the requisite degree of control by the Yugoslavian authorities over these armed forces required by international law for considering the armed conflict to be international was “*overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations”.¹⁶⁷ In the course of their reasoning, the majority considered it necessary to disapprove the International Court’s approach in *Military and Paramilitary activities*. But the legal issues and the factual situation in that case were different from those facing the International Court in *Military and Paramilitary activities*. The Tribunal’s mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility

¹⁶⁵ Case IT-94-1, *Prosecutor v. Tadić*, (1999) *I.L.M.*, vol. 38, p. 1518. For the judgment of the Trial Chamber (1997), see *I.L.R.*, vol. 112, p. 1.

¹⁶⁶ Case IT-94-1, *Prosecutor v. Tadić*, (1999) *I.L.M.*, vol. 38, p. 1518, at p. 1541, para. 117 (emphasis in original).

¹⁶⁷ *Ibid.*, at p. 1546, para. 145 (emphasis in original).

but the applicable rules of international humanitarian law.¹⁶⁸ In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.¹⁶⁹

(6) Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the “corporate veil” is a mere device or a vehicle for fraud or evasion.¹⁷⁰ The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.¹⁷¹ Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the *de facto* seizure of property by a State-owned oil company, in a case where there was no proof that the State used its

¹⁶⁸ See the explanation given by Judge Shahabuddeen, *ibid.*, at pp. 1614-1615.

¹⁶⁹ The problem of the degree of State control necessary for the purposes of attribution of conduct to the State has also been dealt with, for example, by the Iran-United States Claims Tribunal: *Yeager v. Islamic Republic of Iran*, (1987) 17 *Iran-U.S.C.T.R.* 92, at p. 103. See also *Starrett Housing Corp. v. Government of the Islamic Republic of Iran* (1983) 4 *Iran-U.S.C.T.R.* 122, at p. 143, and by the European Court of Human Rights, *Loizidou v. Turkey, Merits*, *E.C.H.R. Reports*, 1996-VI, p. 2216, at pp. 2235-2236, para. 56. See also *ibid.*, at p. 2234, para. 52, and the decision on the preliminary objections: *E.C.H.R., Series A, No. 310* (1995), at para. 62.

¹⁷⁰ *Barcelona Traction, Light and Power Company, Limited, Second Phase*, *I.C.J. Reports* 1970, p. 3, at p. 39, para. 56-58.

¹⁷¹ E.g. the Workers’ Councils considered in *Schering Corporation v. Islamic Republic of Iran*, (1984) 5 *Iran-U.S.C.T.R.* 361; *Otis Elevator Co. v. Islamic Republic of Iran*, (1987) 14 *Iran-U.S.C.T.R.* 283; *Eastman Kodak Co. v. Islamic Republic of Iran*, (1987) 17 *Iran-U.S.C.T.R.* 153.

ownership interest as a vehicle for directing the company to seize the property.¹⁷² On the other hand, where there was evidence that the corporation was exercising public powers,¹⁷³ or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,¹⁷⁴ the conduct in question has been attributed to the State.¹⁷⁵

(7) It is clear then that a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of. In the text of article 8, the three terms “instructions”, “direction” and “control” are disjunctive; it is sufficient to establish any one of them. At the same time it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act.

(8) Where a State has authorized an act, or has exercised direction or control over it, questions can arise as to the State’s responsibility for actions going beyond the scope of the authorization. For example questions might arise if the agent, while carrying out lawful instructions or directions, engages in some activity which contravenes both the instructions or directions given and the international obligations of the instructing State. Such cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it. In general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way. On the other hand, where persons or groups have committed acts

¹⁷² *SEDCO, Inc. v. National Iranian Oil Co.*, (1987) 15 *Iran-U.S.C.T.R.* 23. See also *International Technical Products Corp. v. Islamic Republic of Iran*, (1985) 9 *Iran-U.S.C.T.R.* 206; *Flexi-Van Leasing, Inc. v. Islamic Republic of Iran*, (1986) 12 *Iran-U.S.C.T.R.* 335, at p. 349.

¹⁷³ *Phillips Petroleum Co. Iran v. Islamic Republic of Iran* (1989) 21 *Iran-U.S.C.T.R.* 79; *Petrolane, Inc. v. Government of the Islamic Republic of Iran* (1991) 27 *Iran-U.S.C.T.R.* 64.

¹⁷⁴ *Foremost Tehran, Inc. v. Islamic Republic of Iran* (1986) 10 *Iran-U.S.C.T.R.* 228; *American Bell International Inc. v. Islamic Republic of Iran* (1986) 12 *Iran-U.S.C.T.R.* 170.

¹⁷⁵ Cf. also *Hertzberg et al. v. Finland*, (Communication No. R.14/61), (1982), A/37/40, annex XIV, para. 9.1. See also *X v. Ireland*, (App. 4125/69), (1971) 14 *Yearbook E.C.H.R.* 198; *Young, James and Webster v. United Kingdom*, *E.C.H.R., Series A, No. 44* (1981).

under the effective control of a State the condition for attribution will still be met even if particular instructions may have been ignored. The conduct will have been committed under the control of the State and it will be attributable to the State in accordance with article 8.

(9) Article 8 uses the words “person or group of persons”, reflecting the fact that conduct covered by the article may be that of a group lacking separate legal personality but acting on a de facto basis. Thus while a State may authorize conduct by a legal entity such as a corporation, it may also deal with aggregates of individuals or groups that do not have legal personality but are nonetheless acting as a collective.

Article 9

Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Commentary

(1) Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase “in circumstances such as to call for”. Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, e.g., after foreign occupation.

(2) The principle underlying article 9 owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces:¹⁷⁶ in effect it is a form of agency of necessity. Instances continue to occur from time to time in the field of State

¹⁷⁶ This principle is recognized as legitimate by article 2 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land: J. B. Scott (ed.), *The Proceedings of the Hague Peace Conferences: The Conference of 1907* (New York, Oxford University Press, 1920), vol. I, p. 623; and by article 4, paragraph A (6), of the Geneva Convention of 12 August 1949 on the Treatment of Prisoners of War, United Nations, *Treaty Series*, vol. 75, p. 135.

responsibility. Thus the position of the Revolutionary Guards or “Komitehs” immediately after the revolution in the Islamic Republic of Iran was treated by the Iran-United States Claims Tribunal as covered by the principle expressed in article 9. *Yeager v. Islamic Republic of Iran* concerned, *inter alia*, the action of performing immigration, customs and similar functions at Tehran airport in the immediate aftermath of the revolution. The Tribunal held the conduct attributable to the Islamic Republic of Iran, on the basis that, if it was not actually authorized by the Government, then the Guards ...

“at least exercised elements of the governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object.”¹⁷⁷

(3) Article 9 establishes three conditions which must be met in order for conduct to be attributable to the State: first, the conduct must effectively relate to the exercise of elements of the governmental authority, secondly, the conduct must have been carried out in the absence or default of the official authorities, and thirdly, the circumstances must have been such as to call for the exercise of those elements of authority.

(4) As regards the first condition, the person or group acting must be performing governmental functions, though they are doing so on their own initiative. In this respect, the nature of the activity performed is given more weight than the existence of a formal link between the actors and the organization of the State. It must be stressed that the private persons covered by article 9 are not equivalent to a general *de facto* government. The cases envisaged by article 9 presuppose the existence of a government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general *de facto* government, on the other hand, is itself an apparatus of the State, replacing that which existed previously. The conduct of the organs of such a government is covered by article 4 rather than article 9.¹⁷⁸

¹⁷⁷ (1987) 17 *Iran-U.S.C.T.R.* 92 at p. 104, para. 43

¹⁷⁸ See e.g. the award by Arbitrator Taft in the *Aguilar-Amory and Royal Bank of Canada Claims (Timoco Case)*, *UNRIAA*, vol. 1, p. 371 (1923) at pp. 381-2. On the responsibility of the State for the conduct of *de facto* Governments, see also J.A. Frowein, *Das de facto-Regime im*

(5) In respect of the second condition, the phrase “in the absence or default of” is intended to cover both the situation of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality. The phrase “absence or default” seeks to capture both situations.

(6) The third condition for attribution under article 9 requires that the circumstances must have been such as to call for the exercise of elements of the governmental authority by private persons. The term “called for” conveys the idea that some exercise of governmental functions was called for, though not necessarily the conduct in question. In other words, the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise police or other functions in the absence of any constituted authority. There is thus a normative element in the form of agency entailed by article 9, and this distinguishes these situations from the normal principle that conduct of private parties, including insurrectionary forces, is not attributable to the State.¹⁷⁹

Article 10

Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.
3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Völkerrecht (Cologne, Heymanns, 1968), pp. 70-71. Conduct of a Government in exile might be covered by article 9, depending on the circumstances.

¹⁷⁹ See e.g. *Sambiaggio*, *UNRIAA*, vol. X, p. 499 (1904); and see further below, article 10 and commentary.

Commentary

(1) Article 10 deals with the special case of attribution to a State of conduct of an insurrectional or other movement which subsequently becomes the new government of the State or succeeds in establishing a new State.

(2) At the outset, the conduct of the members of the movement presents itself purely as the conduct of private individuals. It can be placed on the same footing as that of persons or groups who participate in a riot or mass demonstration and it is likewise not attributable to the State. Once an organized movement comes into existence as a matter of fact, it will be even less possible to attribute its conduct to the State, which will not be in a position to exert effective control over its activities. The general principle in respect of the conduct of such movements, committed during the continuing struggle with the constituted authority, is that it is not attributable to the State under international law. In other words, the acts of unsuccessful insurrectional movements are not attributable to the State, unless under some other article of chapter II, for example in the special circumstances envisaged by article 9.

(3) Ample support for this general principle is found in arbitral jurisprudence. International arbitral bodies, including mixed claims commissions¹⁸⁰ and arbitral tribunals¹⁸¹ have uniformly affirmed what Commissioner Nielsen in the *Solis* case described as a “well-established principle of international law”, that no government can be held responsible for the conduct of rebellious groups committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection.¹⁸² Diplomatic practice is remarkably consistent in recognizing that the conduct of an insurrectional movement cannot be attributed to the State. This can be seen, for example, from the preparatory work for the 1930 Codification Conference. Replies of Governments to point IX of the request for information

¹⁸⁰ See the decisions of the various mixed commissions: *Zuloaga and Miramon Governments*, Moore, *International Arbitrations*, vol. III, p. 2873; *McKenny*, *ibid.*, vol. III, p. 2881; *Confederate States*, *ibid.*, vol. III, p. 2886; *Confederate Debt*, *ibid.*, vol. III, p. 2900; *Maximilian Government*, Moore, *ibid.*, p. 2902, at pp. 2928-2929.

¹⁸¹ See e.g. *British Claims in the Spanish Zone of Morocco*, UNRIAA., vol. II, p. 615 (1925), at p. 642; *Several British Subjects (Iloilo Claims)*, UNRIAA., vol. VI, p. 158 (1925), at pp. 159-160.

¹⁸² UNRIAA., vol. IV, p. 358 (1928), at p. 361 (referring to *Home Missionary Society*, UNRIAA., vol. VI, p. 42 (1920); Cf. the *Sambiaggio* case, UNRIAA., vol. X, p. 499 (1903), at p. 524.

addressed to them by the Preparatory Committee indicated substantial agreement that: (a) the conduct of organs of an insurrectional movement could not be attributed as such to the State or entail its international responsibility; and (b) only conduct engaged in by organs of the State in connection with the injurious acts of the insurgents could be attributed to the State and entail its international responsibility, and then only if such conduct constituted a breach of an international obligation of that State.¹⁸³

(4) The general principle that the conduct of an insurrectional or other movement is not attributable to the State is premised on the assumption that the structures and organization of the movement are and remain independent of those of the State. This will be the case where the State successfully puts down the revolt. In contrast, where the movement achieves its aims and either installs itself as the new government of the State or forms a new State in part of the territory of the pre-existing State or in a territory under its administration, it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it. In these exceptional circumstances, article 10 provides for the attribution of the conduct of the successful insurrectional or other movement to the State. The basis for the attribution of conduct of a successful insurrectional or other movement to the State under international law lies in the continuity between the movement and the eventual government. Thus the term “conduct” only concerns the conduct of the movement as such and not the individual acts of members of the movement, acting in their own capacity.

(5) Where the insurrectional movement, as a new government, replaces the previous government of the State, the ruling organization of the insurrectional movement becomes the ruling organization of that State. The continuity which thus exists between the new organization of the State and that of the insurrectional movement leads naturally to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle. In such a case, the State does not cease to exist as a subject of international law. It remains the same State, despite the changes, reorganizations and adaptations which occur in its institutions. Moreover it is the only subject of international law to which responsibility can be attributed.

¹⁸³ League of Nations, Conference for the Codification of International Law, vol. III: *Bases of Discussion for the Conference drawn up by the Preparatory Committee* (Doc. C.75.M.69.1929.V.), p. 108; *Supplement to Volume III: Replies made by the Governments to the Schedule of Points: Replies of Canada and the United States of America* (Doc. C.75(a).M.69(a).1929.V.), pp. 3, 20.

The situation requires that acts committed during the struggle for power by the apparatus of the insurrectional movement should be attributable to the State, alongside acts of the then established government.

(6) Where the insurrectional or other movement succeeds in establishing a new State, either in part of the territory of the pre-existing State or in a territory which was previously under its administration, the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity between the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment, and this represents the accepted rule.

(7) Paragraph 1 of article 10 covers the scenario in which the insurrectional movement, having triumphed, has substituted its structures for those of the previous government of the State in question. The phrase “which becomes the new government” is used to describe this consequence. However, the rule in paragraph 1 should not be pressed too far in the case of governments of national reconciliation, formed following an agreement between the existing authorities and the leaders of an insurrectional movement. The State should not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed government. Thus the criterion of application of paragraph 1 is that of a real and substantial continuity between the former insurrectional movement and the new government it has succeeded in forming.

(8) Paragraph 2 of article 10 addresses the second scenario, where the structures of the insurrectional or other revolutionary movement become those of a new State, constituted by secession or decolonization in part of the territory which was previously subject to the sovereignty or administration of the predecessor State. The expression “or in any other territory under its administration” is included in order to take account of the differing legal status of different dependent territories.

(9) A comprehensive definition of the types of groups encompassed by the term “insurrectional movement” as used in article 10 is made difficult by the wide variety of forms which insurrectional movements may take in practice, according to whether there is relatively limited internal unrest, a genuine civil war situation, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter-revolutionary movements and so on. Insurrectional movements may be based in the territory of the State against which the movement’s actions are directed, or on the territory of a third State. Despite this diversity, the threshold for the application of the laws of armed conflict contained in Additional Protocol II of 1977 may be taken as a guide.¹⁸⁴ Article 1, paragraph 1 refers to “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”, and it contrasts such groups with “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar character” (article 1, para. 2). This definition of “dissident armed forces” reflects, in the context of the Protocols, the essential idea of an “insurrectional movement”.

(10) As compared with paragraph 1, the scope of the attribution rule articulated by paragraph 2 is broadened to include “insurrectional or other” movements. This terminology reflects the existence of a greater variety of movements whose actions may result in the formation of a new State. The words do not however extend to encompass the actions of a group of citizens advocating separation or revolution where these are carried out within the framework of the predecessor State. Nor does it cover the situation where an insurrectional movement within a territory succeeds in its agitation for union with another State. This is essentially a case of succession, and outside the scope of the articles, whereas article 10 focuses on the continuity of the movement concerned and the eventual new government or State, as the case may be.

¹⁸⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), United Nations, *Treaty Series*, vol. 1125, p. 609

(11) No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international “legitimacy” or of any illegality in respect of their establishment as a government, despite the potential importance of such distinctions in other contexts.¹⁸⁵ From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin.¹⁸⁶ Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law.

(12) Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10. The international arbitral decisions, e.g. those of the mixed commissions established in respect of Venezuela (1903) and Mexico (1920-1930), support the attribution of conduct by insurgents where the movement is successful in achieving its revolutionary aims. For example in the *Bolivar Railway Company* claim, the principle is stated in the following terms:

“The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented *ab initio* a changing national will, crystallizing in the finally successful result.”¹⁸⁷

¹⁸⁵ See H. Atlam, “International Liberation Movements and International Responsibility”, in B. Simma & M. Spinedi (eds.), *United Nations Codification of State Responsibility* (New York, Oceana, 1987), p. 35.

¹⁸⁶ As the Court said in the *Namibia* advisory opinion, “[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States”: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *I.C.J. Reports 1971*, p. 16, at p. 54, para. 118.

¹⁸⁷ *UNRIAA.*, vol. IX, p. 445 (1903), at p. 453. See also *Puerto Cabello and Valencia Railway Company*, *ibid.*, vol. IX, p. 510 (1903), at p. 513.

The French-Venezuelan Mixed Claims Commission in its decision concerning the *French Company of Venezuelan Railroads* emphasized that the State cannot be held responsible for the acts of revolutionaries “unless the revolution was successful”, since such acts then involve the responsibility of the State “under the well-recognized rules of public law”.¹⁸⁸ In the *Pinson* case, the French-Mexican Claims Commission ruled that ...

“if the injuries originated, for example, in requisitions or forced contributions demanded ... by revolutionaries before their final success, or if they were caused... by offenses committed by successful revolutionary forces, the responsibility of the State ... cannot be denied.”¹⁸⁹

(13) The possibility of holding the State responsible for conduct of a successful insurrectional movement was brought out in the request for information addressed to Governments by the Preparatory Committee for the 1930 Codification Conference.¹⁹⁰ On the basis of replies received from a number of governments, the Preparatory Committee of the Conference drew up the following Basis of Discussion: “A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops.”¹⁹¹ Although the proposition was never discussed, it may be considered to reflect the rule of attribution now contained in paragraph 2.

¹⁸⁸ *UNRIAA.*, vol. X, p. 285 (1902), at p. 354. See also *Dix* case, *UNRIAA*, vol. IX, p. 119 (1902).

¹⁸⁹ *UNRIAA.*, vol. V, p. 327 (1928), at p. 353.

¹⁹⁰ League of Nations, Conference for the Codification of International Law, vol. III: *Bases of Discussion for the Conference drawn up by the Preparatory Committee* (Doc. C.75.M.69.1929.V.), pp. 108, 116; reproduced in *Yearbook ... 1956*, vol. II, p. 223, at p. 224.

¹⁹¹ Basis of Discussion No. 22 (c), League of Nations, Conference for the Codification of International Law, Vol. III: *Bases of Discussion for the Conference drawn up by the Preparatory Committee* (Doc. C.75.M.69.1929.V.), p. 118; reproduced in *Yearbook ... 1956*, vol. II, p. 223, at p. 224.

(14) More recent decisions and practice do not, on the whole, give any reason to doubt the propositions contained in article 10. In one case the Supreme Court of Namibia went even further in accepting responsibility for “anything done” by the predecessor administration of South Africa.¹⁹²

(15) Exceptional cases may occur where the State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement’s conduct but improperly failed to do so. This possibility is preserved by paragraph 3 of article 10, which provides that the attribution rules of paragraphs 1 and 2 are without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of other provisions in chapter II. The term “however related to that of the movement concerned” is intended to have a broad meaning. Thus the failure by a State to take available steps to protect the premises of diplomatic missions, threatened from attack by an insurrectional movement, is clearly conduct attributable to the State and is preserved by paragraph 3.

(16) A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. The topic of the international responsibility of unsuccessful insurrectional or other movements, however, falls outside the scope of the present Articles, which are concerned only with the responsibility of States.

Article 11

Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

¹⁹² Guided in particular by a constitutional provision the Court held that “the new government inherits responsibility for the acts committed by the previous organs of the State”: *Minister of Defence, Namibia v. Mwandighi*, 1992 (2) SA 355 at p. 360; *I.L.R.*, vol. 91, p. 341, at p. 361. See on the other hand *44123 Ontario Ltd. v. Crispus Kiyonga*, (1992) 11 Kampala LR 14, at p. 20-1; *I.L.R.*, vol. 103, p. 259, at p. 266 (High Court, Uganda).

Commentary

(1) All the bases for attribution covered in chapter II, with the exception of the conduct of insurrectional or other movements under article 10, assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the alleged wrongful act. Article 11, by contrast, provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own.

(2) In many cases, the conduct which is acknowledged and adopted by a State will be that of private persons or entities. The general principle, drawn from State practice and international judicial decisions, is that the conduct of a person or group of persons not acting on behalf of the State is not considered as an act of the State under international law. This conclusion holds irrespective of the circumstances in which the private person acts and of the interests affected by the person's conduct.

(3) Thus like article 10, article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes "nevertheless" that conduct is to be considered as an act of a State "if and to the extent that the State acknowledges and adopts the conduct in question as its own". Instances of the application of the principle can be found in judicial decisions and State practice. For example, in the *Lighthouses* arbitration, a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been "endorsed by [Greece] as if it had been a regular transaction ... and eventually continued by her, even after the acquisition of territorial sovereignty over the island ..."¹⁹³ In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory.¹⁹⁴ However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it.

¹⁹³ *UNRIAA*, vol. XII, p. 155 (1956), at p. 198.

¹⁹⁴ The matter is reserved by art. 39, Vienna Convention on Succession of States in Respect of Treaties, United Nations, *Treaty Series*, vol. 1946, p. 3.

(4) Outside the context of State succession, the *Diplomatic and Consular Staff* case¹⁹⁵ provides a further example of subsequent adoption by a State of particular conduct. There the Court drew a clear distinction between the legal situation immediately following the seizure of the United States embassy and its personnel by the militants, and that created by a decree of the Iranian State which expressly approved and maintained the situation. In the words of the Court:

“The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.”¹⁹⁶

In that case it made no difference whether the effect of the “approval” of the conduct of the militants was merely prospective, or whether it made the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel *ab initio*. The Islamic Republic of Iran had already been held responsible in relation to the earlier period on a different legal basis, viz., its failure to take sufficient action to prevent the seizure or to bring it to an immediate end.¹⁹⁷ In other cases no such prior responsibility will exist. Where the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect, which is what the Tribunal did in the *Lighthouses* arbitration.¹⁹⁸ This is consistent with the position established by article 10 for insurrectional movements and avoids gaps in the extent of responsibility for what is, in effect, the same continuing act.

¹⁹⁵ *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, p. 3

¹⁹⁶ *Ibid.*, at p. 35, para. 74.

¹⁹⁷ *Ibid.*, at pp. 31-33, paras. 63-68.

¹⁹⁸ *UNRIAA.*, vol. XII, p. 161 (1956), at pp. 197-8.

(5) As regards State practice, the capture and subsequent trial in Israel of Adolf Eichmann may provide an example of the subsequent adoption of private conduct by a State. On 10 May 1960, Eichmann was captured by a group of Israelis in Buenos Aires. He was held in captivity in Buenos Aires in a private home for some weeks before being taken by air to Israel. Argentina later charged the Israeli Government with complicity in Eichmann's capture, a charge neither admitted nor denied by the Israeli Foreign Minister (Ms. Meir), during the Security Council's discussion of the complaint. She referred to Eichmann's captors as a "volunteer group".¹⁹⁹ Security Council resolution 138 of 23 June 1960 implied a finding that the Israeli Government was at least aware of, and consented to, the successful plan to capture Eichmann in Argentina. It may be that Eichmann's captors were "in fact acting on the instructions of or under the direction or control of" Israel, in which case their conduct was more properly attributed to the State under article 8. But where there are doubts about whether certain conduct falls within article 8, these may be resolved by the subsequent adoption of the conduct in question by the State.

(6) The phrase "acknowledges and adopts the conduct in question as its own" is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement.²⁰⁰ The Court in the *Diplomatic and Consular Staff* case used phrases such as "approval", "endorsement", "the seal of official governmental approval" and "the decision to perpetuate [the situation]".²⁰¹ These were sufficient in the context of that case, but as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies States often take positions which amount to "approval" or "endorsement" of conduct in some general sense but do not involve any assumption of responsibility. The language of "adoption", on the other hand, carries with it the idea that the

¹⁹⁹ *S.C.O.R., Fifteenth Year*, 865th Mtg., 22 June 1960, p. 4.

²⁰⁰ The separate question of aid or assistance by a State to internationally wrongful conduct of another State is dealt with in article 16.

²⁰¹ *Diplomatic and Consular Staff, I.C.J. Reports 1980*, p. 3.

conduct is acknowledged by the State as, in effect, its own conduct. Indeed, provided the State's intention to accept responsibility for otherwise non-attributable conduct is clearly indicated, article 11 may cover cases in which a State has accepted responsibility for conduct of which it did not approve, had sought to prevent and deeply regretted. However such acceptance may be phrased in the particular case, the term "acknowledges and adopts" in article 11 makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own.

(7) The principle established by article 11 governs the question of attribution only. Where conduct has been acknowledged and adopted by a State, it will still be necessary to consider whether the conduct was internationally wrongful. For the purposes of article 11, the international obligations of the adopting State are the criterion for wrongfulness. The conduct may have been lawful so far as the original actor was concerned, or the actor may have been a private party whose conduct in the relevant respect was not regulated by international law. By the same token, a State adopting or acknowledging conduct which is lawful in terms of its own international obligations does not thereby assume responsibility for the unlawful acts of any other person or entity. Such an assumption of responsibility would have to go further and amount to an agreement to indemnify for the wrongful act of another.

(8) The phrase "if and to the extent that" is intended to convey a number of ideas. First, the conduct of, in particular, private persons, groups or entities is not attributable to the State unless under some other article of chapter II or unless it has been acknowledged and adopted by the State. Secondly, a State might acknowledge and adopt conduct only to a certain extent. In other words a State may elect to acknowledge and adopt only some of the conduct in question. Thirdly, the act of acknowledgment and adoption, whether it takes the form of words or conduct, must be clear and unequivocal.

(9) The conditions of acknowledgement and adoption are cumulative, as indicated by the word "and". The order of the two conditions indicates the normal sequence of events in cases in which article 11 is relied on. Acknowledgement and adoption of conduct by a State might be express (as for example in the *Diplomatic and Consular Staff* case), or it might be inferred from the conduct of the State in question.

Chapter III

Breach of an international obligation

(1) There is a breach of an international obligation when conduct attributed to a State as a subject of international law amounts to a failure by that State to comply with an international obligation incumbent upon it, or, to use the language of article 2 (b), when such conduct constitutes “a breach of an international obligation of the State”. This chapter develops the notion of a breach of an international obligation, to the extent that this is possible in general terms.

(2) It must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States.²⁰² In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc. There is no such thing as a breach of an international obligation in the abstract, and chapter III can only play an ancillary role in determining whether there has been such a breach, or the time at which it occurred, or its duration. Nonetheless a number of basic principles can be stated.

(3) The essence of an internationally wrongful act lies in the non-conformity of the State’s actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation. Such conduct gives rise to the new legal relations which are grouped under the common denomination of international responsibility. Chapter III therefore begins with a provision specifying in general terms when it may be considered that there is a breach of an international obligation (article 12). The basic concept having been defined, the other provisions of the chapter are devoted to specifying how this concept applies to various situations. In particular, the chapter deals with the question of the intertemporal law as it applies to State responsibility, i.e. the principle that a State is only responsible for a breach of an international obligation if the obligation is in force for the State at the time of the breach (article 13), with the equally important question of continuing breaches (article 14), and with the special problem of

²⁰² See the Introduction to these commentaries, paras. (2)-(4).

determining whether and when there has been a breach of an obligation which is directed not at single but at composite acts, i.e. where the essence of the breach lies in a series of acts defined in aggregate as wrongful (article 15).

(4) For the reason given in paragraph (2) above, it is neither possible nor desirable to deal in the framework of this Part with all the issues that can arise in determining whether there has been a breach of an international obligation. Questions of evidence and proof of such a breach fall entirely outside the scope of the Articles. Other questions concern rather the classification or typology of international obligations. These have only been included in the text where they can be seen to have distinct consequences within the framework of the secondary rules of State responsibility.²⁰³

Article 12

Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Commentary

(1) As stated in article 2, a breach by a State of an international obligation incumbent upon it gives rise to its international responsibility. It is first necessary to specify what is meant by a breach of an international obligation. This is the purpose of article 12, which defines in the most general terms what constitutes a breach of an international obligation by a State. In order to conclude that there is a breach of an international obligation in any specific case, it will be necessary to take account of the other provisions of chapter III which specify further conditions relating to the existence of a breach of an international obligation, as well as the provisions of chapter V dealing with circumstances which may preclude the wrongfulness of an act of a State. But in the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.

(2) In introducing the notion of a breach of an international obligation, it is necessary again to emphasize the autonomy of international law in accordance with the principle stated in article 3. In the terms of article 12, the breach of an international obligation consists in the

²⁰³ See, e.g., the classification of obligations of conduct and results, commentary to article 12, paras. (11) and (12).

disconformity between the conduct required of the State by that obligation and the conduct actually adopted by the State - i.e., between the requirements of international law and the facts of the matter. This can be expressed in different ways. For example the International Court has used such expressions as “incompatibility with the obligations” of a State,²⁰⁴ acts “contrary to” or “inconsistent with” a given rule,²⁰⁵ and “failure to comply with treaty obligations”.²⁰⁶ In the *ELSI* case, a Chamber of the Court asked the “question whether the requisition was in conformity with the requirements... of the FCN Treaty”.²⁰⁷ The expression “not in conformity with what is required of it by that obligation” is the most appropriate to indicate what constitutes the essence of a breach of an international obligation by a State. It allows for the possibility that a breach may exist even if the act of the State is only partly contrary to an international obligation incumbent upon it. In some cases precisely defined conduct is expected from the State concerned; in others the obligation only sets a minimum standard above which the State is free to act. Conduct proscribed by an international obligation may involve an act or an omission or a combination of acts and omissions; it may involve the passage of legislation, or specific administrative or other action in a given case, or even a threat of such action, whether or not the threat is carried out, or a final judicial decision. It may require the provision of facilities, or the taking of precautions or the enforcement of a prohibition. In every case, it is by comparing the conduct in fact engaged in by the State with the conduct legally prescribed by the international obligation that one can determine whether or not there is a breach of that obligation. The phrase “is not in conformity with” is flexible enough to cover the many different ways in which an obligation can be expressed, as well as the various forms which a breach may take.

²⁰⁴ *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, p. 3, at p. 29, para. 56.

²⁰⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14, at p. 64, para. 115, and at p. 98, para. 186, respectively.

²⁰⁶ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, at p. 46, para. 57.

²⁰⁷ *Elettronica Sicula S.p.A. (ELSI)*, I.C.J. Reports 1989, p. 15, at p. 50, para. 70.

(3) Article 12 states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation “regardless of its origin”. As this phrase indicates, the Articles are of general application. They apply to all international obligations of States, whatever their origin may be. International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order. States may assume international obligations by a unilateral act.²⁰⁸ An international obligation may arise from provisions stipulated in a treaty (a decision of an organ of an international organization competent in the matter, a judgment given between two States by the International Court of Justice or another tribunal, etc.). It is unnecessary to spell out these possibilities in article 12, since the responsibility of a State is engaged by the breach of an international obligation whatever the particular origin of the obligation concerned. The formula “regardless of its origin” refers to all possible sources of international obligations, that is to say, to all processes for creating legal obligations recognized by international law. The word “source” is sometimes used in this context, as in the preamble to the Charter of the United Nations which stresses the need to respect “the obligations arising from treaties and other sources of international law”. The word “origin” which has the same meaning, is not attended by the doubts and doctrinal debates the term “source” has provoked.

(4) According to article 12, the origin or provenance of an obligation does not, as such, alter the conclusion that responsibility will be entailed if it is breached by a State, nor does it, as such, affect the regime of State responsibility thereby arising. Obligations may arise for a State by a treaty and by a rule of customary international law or by a treaty and a unilateral act.²⁰⁹ Moreover these various grounds of obligation interact with each other, as practice clearly shows. Treaties, especially multilateral treaties, can contribute to the formation of general international

²⁰⁸ Thus France undertook by a unilateral act not to engage in further atmospheric nuclear testing: *Nuclear Tests (Australia v. France)*, *I.C.J. Reports 1974*, p. 253; *Nuclear Tests (New Zealand v. France)*, *I.C.J. Reports 1974*, p. 457. The extent of the obligation thereby undertaken was clarified in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, *I.C.J. Reports 1995*, p. 288.

²⁰⁹ The International Court has recognized “[t]he existence of identical rules in international treaty law and customary law” on a number of occasions: see *North Sea Continental Shelf*, *I.C.J. Reports 1969*, p. 3, at pp. 38-39, para. 63; *Military and Paramilitary Activities*, *I.C.J. Reports 1986*, p. 14, at p. 95, para. 177.

law; customary law may assist in the interpretation of treaties; an obligation contained in a treaty may be applicable to a State by reason of its unilateral act, and so on. Thus international courts and tribunals have treated responsibility as arising for a State by reason of any “violation of a duty imposed by an international juridical standard”.²¹⁰ In the *Rainbow Warrior* arbitration, the Tribunal said that “any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation”.²¹¹ In the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice referred to the relevant draft article provisionally adopted by the Commission in 1976 in support of the proposition that it is “well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect”.²¹²

(5) Thus there is no room in international law for a distinction, such as is drawn by some legal systems, between the regime of responsibility for breach of a treaty and for breach of some other rule, i.e. for responsibility arising *ex contractu* or *ex delicto*. In the *Rainbow Warrior* arbitration, the Tribunal affirmed that “in the international law field there is no distinction between contractual and tortious responsibility”.²¹³ As far as the origin of the obligation breached is concerned, there is a single general regime of State responsibility. Nor does any distinction exist between the “civil” and “criminal” responsibility as is the case in internal legal systems.

²¹⁰ *Dickson Car Wheel Co.*, *UNRIAA*, vol. IV, p. 669 (1931), at p. 678; cf. *Goldenberg*, *ibid.*, vol. II, p. 901 (1928), at pp. 908-909; *International Fisheries Co.*, *ibid.*, vol. IV, p. 691 (1931), at p. 701 (“some principle of international law”); *Armstrong Cork Co.*, *ibid.*, vol. XIV, p. 159 (1953), at p. 163 (“any rule whatsoever of international law”).

²¹¹ *Rainbow Warrior (New Zealand/France)*, *UNRIAA*, vol. XX, p. 217 (1990), at p. 251, para. 75. See also *Barcelona Traction, Light and Power Company, Limited, Second Phase*, *I.C.J. Reports 1970*, p. 3, at p. 46, para. 86 (“breach of an international obligation arising out of a treaty or a general rule of law”).

²¹² *I.C.J. Reports 1997*, p. 7, at p. 38, para. 47. The qualification “likely to be involved” may have been inserted because of possible circumstances precluding wrongfulness in that case.

²¹³ *UNRIAA*, vol. XX, p. 217 (1990), at p. 251, para. 75.

(6) State responsibility can arise from breaches of bilateral obligations or of obligations owed to some States or to the international community as a whole. It can involve relatively minor infringements as well as the most serious breaches of obligations under peremptory norms of general international law. Questions of the gravity of the breach and the peremptory character of the obligation breached can affect the consequences which arise for the responsible State and, in certain cases, for other States also. Certain distinctions between the consequences of certain breaches are accordingly drawn in Parts Two and Three of these Articles.²¹⁴ But the regime of State responsibility for breach of an international obligation under Part One is comprehensive in scope, general in character and flexible in its application: Part One is thus able to cover the spectrum of possible situations without any need for further distinctions between categories of obligation concerned or the category of the breach.

(7) Even fundamental principles of the international legal order are not based on any special source of law- or specific law-making procedure, in contrast with rules of constitutional character in internal legal systems. In accordance with article 53 of the Vienna Convention on the Law of Treaties, a peremptory norm of general international law is one which is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.²¹⁵ Article 53 recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as par excellence the holders of normative authority on behalf of the international community. Moreover, obligations imposed on States by peremptory norms necessarily affect the vital interests of the international community as a whole and may entail a stricter regime of responsibility than that applied to other internationally wrongful acts. But this is an issue belonging to the content of State responsibility.²¹⁶ So far at least as Part One of the Articles is concerned, there is a unitary regime of State responsibility which is general in character.

²¹⁴ See chapter Two, Part III and commentary; see also article 48 and commentary.

²¹⁵ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

²¹⁶ See articles 40-41 and commentaries.

(8) Rather similar considerations apply with respect to obligations arising under the Charter of the United Nations. Since the Charter is a treaty, the obligations it contains are, from the point of view of their origin, treaty obligations. The special importance of the Charter, as reflected in its Article 103,²¹⁷ derives from its express provisions as well as from the virtually universal membership of States in the United Nations.

(9) The general scope of the Articles extends not only to the conventional or other origin of the obligation breached but also to its subject matter. International awards and decisions specifying the conditions for the existence of an internationally wrongful act speak of the breach of an international obligation without placing any restriction on the subject-matter of the obligation breached.²¹⁸ Courts and tribunals have consistently affirmed the principle that there is no a priori limit to the subject matters on which States may assume international obligations. Thus the Permanent Court stated in its first judgment, in the *S.S. "Wimbledon"*, that "the right of entering into international engagements is an attribute of State sovereignty".²¹⁹ That proposition has often been endorsed.²²⁰

(10) In a similar perspective, it has sometimes been argued that an obligation dealing with a certain subject matter could only have been breached by conduct of the same description. That proposition formed the basis of an objection to the jurisdiction of the Court in the *Oil Platforms*

²¹⁷ According to which "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, the obligations under the present Charter shall prevail."

²¹⁸ See, e.g., *Factory at Chorzów, Jurisdiction*, 1927, *P.C.I.J., Series A, No. 9*, p. 21; *Factory at Chorzów, Merits*, 1928, *P.C.I.J., Series A, No. 17*, p. 29; *Reparation for Injuries Suffered in the Service of the United Nations*, *I.C.J. Reports* 1949, p. 174, at p. 184. In these decisions it is stated that "any breach of an international engagement" entails international responsibility. See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase*, *I.C.J. Reports* 1950, p. 221, at p. 228.

²¹⁹ *S.S. "Wimbledon", Judgments*, 1923, *P.C.I.J., Series A, No. 1*, p. 25.

²²⁰ See, e.g., *Nottebohm, Second Phase*, *I.C.J. Reports* 1955, p. 4, at pp. 20-21; *Right of Passage over Indian Territory, Merits*, *I.C.J. Reports* 1960, p. 6, at p. 33; *Military and Paramilitary Activities*, *I.C.J. Reports* 1986, p. 14, at p. 131, para. 259.

case.²²¹ It was argued that a treaty of friendship, commerce and navigation could not in principle have been breached by conduct involving the use of armed force. The Court responded in the following terms:

“The Treaty of 1955 imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not per se excluded from the reach of the Treaty of 1955.”²²²

Thus the breach by a State of an international obligation constitutes an internationally wrongful act, whatever the subject matter or content of the obligation breached, and whatever description may be given to the non-conforming conduct.

(11) Article 12 also states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation, “regardless of its ... character”. In practice, various classifications of international obligations have been adopted. For example a distinction is commonly drawn between obligations of conduct and obligations of result. That distinction may assist in ascertaining when a breach has occurred. But it is not exclusive,²²³ and it does not seem to bear specific or direct consequences as far as the present Articles are concerned. In the *Colozza* case,²²⁴ for example, the European Court of Human Rights was concerned with the trial in absentia of a person who, without actual notice of his trial,

²²¹ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, I.C.J. Reports 1996, p. 803.

²²² Ibid., at pp. 811-812, para. 21.

²²³ Cf., *Gabčíkovo-Nagymaros Project*, I.C.J. Reports 1997, p. 7, at p. 77, para. 135, where the Court referred to the parties having accepted “obligations of conduct, obligations of performance, and obligations of result”.

²²⁴ *Colozza and Rubinat v. Italy*, E.C.H.R., Series A, No. 89 (1985).

was sentenced to six years' imprisonment and was not allowed subsequently to contest his conviction. He claimed that he had not had a fair hearing, contrary to article 6 (1) of the European Convention. The Court noted that:

“The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of article 6 (1) in this field. The Court's task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved... For this to be so, the resources available under domestic law must be shown to be effective and a person ‘charged with a criminal offence’ ... must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure*.”²²⁵

The Court thus considered that article 6 (1) imposed an obligation of result.²²⁶ But, in order to decide whether there had been a breach of the Convention in the circumstances of the case, it did not simply compare the result required (the opportunity for a trial in the accused's presence) with the result practically achieved (the lack of that opportunity in the particular case). Rather it

²²⁵ Ibid., at pp. 15-16, para. 30, citing *De Cubber v. Belgium*, E.C.H.R., Series A, No. 86 (1984), p. 20, para. 35.

²²⁶ Cf. *Plattform ‘Ärzte für das Leben’ v. Austria*, in which the Court gave the following interpretation of article 11:

“While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used ... In this area the obligation they enter into under article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved”.

E.C.H.R., Series A, No. 139 (1988), p. 12, para. 34. In the *Colozza* case, the Court used similar language but concluded that the obligation was an obligation of result. Cf. C. Tomuschat, “What is a ‘Breach’ of the European Convention on Human Rights?”, in Lawson & de Blois (eds.), *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers* (Dordrecht, Nijhoff, 1994), p. 315, at p. 328.

examined what more Italy could have done to make the applicant's right "effective".²²⁷ The distinction between obligations of conduct and result was not determinative of the actual decision that there had been a breach of article 6 (1).²²⁸

(12) The question often arises whether an obligation is breached by the enactment of legislation by a State, in cases where the content of the legislation *prima facie* conflicts with what is required by the international obligation, or whether the legislation has to be implemented in the given case before the breach can be said to have occurred. Again, no general rule can be laid down applicable to all cases.²²⁹ Certain obligations may be breached by the mere passage of incompatible legislation.²³⁰ Where this is so, the passage of the legislation without more entails the international responsibility of the enacting State, the legislature itself being an organ of the State for the purposes of the attribution of responsibility.²³¹ In other circumstances, the

²²⁷ *E.C.H.R., Series A, No. 89* (1985), at para. 28.

²²⁸ See also *Islamic Republic of Iran v. United States of America, Cases A15 (IV) and A24*, (1998) 32 *Iran-U.S.C.T.R.*, 115.

²²⁹ Cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, *I.C.J. Reports 1988*, p. 12, at p. 30, para. 42.

²³⁰ A uniform law treaty will generally be construed as requiring immediate implementation, i.e. as embodying an obligation to make the provisions of the uniform law a part of the law of each State party: see, e.g., B. Conforti, "Obblighi di mezzi e obblighi di risultato nelle convenzioni di diritto uniforme", *Rivista di diritto internazionale privato e processuale*, vol. 24 (1988), p. 233.

²³¹ See article 4 and commentary. For illustrations see, e. g., the findings of the European Court of Human Rights in *Norris v. Ireland*, *E.C.H.R., Series A, No. 142* (1988), para. 31, citing *Klass v. Germany*, *E.C.H.R., Series A, No. 28* (1978), at para. 33; *Marckx v. Belgium*, *E.C.H.R., Series A, No. 31* (1979), at para. 27; *Johnston v. Ireland*, *E.C.H.R., Series A, No. 112* (1986), at para. 33; *Dudgeon v. United Kingdom*, *E.C.H.R., Series A, No. 45* (1981), para. 41; *Modinos v. Cyprus*, *E.C.H.R., Series A, No. 259* (1993), at para. 24. See also Advisory Opinion OC-14/94, *International responsibility for the promulgation and enforcement of laws in violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, *Inter-Am.Ct.H.R., Series A, No. 14* (1994). The Inter-American Court also considered it possible to determine whether draft legislation was compatible with the provisions of human rights treaties: Advisory Opinion OC-3/83, *Restrictions to the Death Penalty (Arts. 4 (2) and 4 (4) of the American Convention on Human Rights)*, *Inter-Am.Ct.H.R. Series A, No. 3* (1983).

enactment of legislation may not in and of itself amount to a breach,²³² especially if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question. In such cases, whether there is a breach will depend on whether and how the legislation is given effect.²³³

Article 13

International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Commentary

(1) Article 13 states the basic principle that, for responsibility to exist, the breach must occur at a time when State is bound by the obligation. This is but the application in the field of State responsibility of the general principle of intertemporal law, as stated by Judge Huber in another context in the *Island of Palmas* case:

“A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.”²³⁴

Article 13 provides an important guarantee for States in terms of claims of responsibility. Its formulation (“does not constitute ... unless ...”) is in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility.

(2) International tribunals have applied the principle stated in article 13 in many cases. An instructive example is provided by the decision of Umpire Bates of the United States-Great Britain Mixed Commission concerning the conduct of British authorities

²³² As the International Court held in *LaGrand (Germany v. United States of America)*, *Merits*, judgment of 27 June 2001, paras. 90-91.

²³³ See, e.g., the report of the WTO Panel in *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, paras. 7.34-7.57.

²³⁴ *UNRIAA*, vol. II, p. 829 (1949), at p. 845. Generally on the intertemporal law see the Resolution of the Institute of International Law, *Annuaire de l'Institut de Droit International*, vol. 56 (1975), at pp. 536-540; for the debate, *ibid.*, pp. 339-374; for Sørensen's reports, *Annuaire de l'Institut de Droit International*, vol. 55 (1973) pp. 1-116. See further, W. Karl, “The Time Factor in the Law of State Responsibility”, in M. Spinedi and B. Simma (eds.), *United Nations Codification of State Responsibility* (New York, Oceana, 1987), p. 95.

who had seized American vessels engaged in the slave trade and freed slaves belonging to American nationals. The incidents referred to the Commission had taken place at different times and the umpire had to determine whether, at the time each incident took place, slavery was “contrary to the law of nations”. Earlier incidents, dating back to a time when the slave trade was considered lawful, amounted to a breach on the part of the British authorities of the international obligation to respect and protect the property of foreign nationals.²³⁵ The later incidents occurred when the slave trade had been “prohibited by all civilized nations” and did not involve the responsibility of Great Britain.²³⁶

(3) Similar principles were applied by Arbitrator Asser in deciding whether the seizure and confiscation by Russian authorities of United States vessels engaged in seal-hunting outside of Russia’s territorial waters should be considered internationally wrongful. In his award in *The “James Hamilton Lewis”*,²³⁷ he observed that the question had to be settled “according to the general principles of the law of nations and the spirit of the international agreements in force and binding upon the two High Parties at the time of the seizure of the vessel”.²³⁸ Since, under the principles in force at the time, Russia had no right to seize the American vessel, the seizure and confiscation of the vessel were unlawful acts for which Russia was required to pay compensation.²³⁹ The same principle has consistently been applied by the European

²³⁵ See *The “Enterprise”*, (1855) de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. I, p. 703; Moore, *International Arbitrations*, vol. IV, p. 4349, at p. 4373. See also *The “Hermosa”* and *The “Créole”* cases, (1855) de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. I, pp. 703, 704; Moore, *International Arbitrations*, vol. IV, pp. 4374, 4375.

²³⁶ See *The “Lawrence”*, (1855) de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. I, p. 740, at p. 741; Moore, *International Arbitrations*, vol. III, p. 2824. See also *The “Volusia”*, (1855) de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. I, p. 741.

²³⁷ *UNRIAA*, vol. IX, p. 66 (1902).

²³⁸ *Ibid.*, at p. 69.

²³⁹ *Ibid.* See also the case of *The “C.H. White”*, *UNRIAA*, vol. IX, p. 71 (1902), at p. 74. In these cases the arbitrator was required by the arbitration agreement itself to apply the law in force at the time the acts were performed. Nevertheless, the intention of the parties was clearly to confirm the application of the general principle in the context of the arbitration agreement, not to establish an exception. See also the *S.S. “Lisman”* case, *ibid.*, vol. III, p. 1767 (1937), at p. 1771.

Commission and Court of Human Rights to deny claims relating to periods during which the European Convention for the Protection of Human Rights and Fundamental Freedoms was not in force for the State concerned.²⁴⁰

(4) State practice also supports the principle. A requirement that arbitrators apply the rules of international law in force at the time when the alleged wrongful acts took place is a common stipulation in arbitration agreements,²⁴¹ and undoubtedly is made by way of explicit confirmation of a generally recognized principle. International law writers who have dealt with the question recognize that the wrongfulness of an act must be established on the basis of the obligations in force at the time when the act was performed.²⁴²

(5) State responsibility can extend to acts of the utmost seriousness, and the regime of responsibility in such cases will be correspondingly stringent. But even when a new peremptory norm of general international law comes into existence, as contemplated by article 64 of the Vienna Convention on the Law of Treaties, this does not entail any retrospective assumption of responsibility. Article 71 (2) provides that such a new peremptory norm “does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm”.

²⁴⁰ See, e.g., *X v. Germany* (Application 1151/61) (1961), *Recueil des décisions de la Commission européenne des droits de l'homme*, No. 7, p. 119 and many later decisions.

²⁴¹ See, e.g., the declarations exchanged between the United States and Russia for the submission to arbitration of certain disputes concerning the international responsibility of Russia for the seizure of American ships: *UNRIAA*, vol. IX, p. 57 (1900).

²⁴² See e.g. P. Tavernier, *Recherche sur l'application dans le temps des actes et des règles en droit international public* (Paris, L.G.D.J., 1970), pp. 119, 135, 292; D. Bindschedler-Robert, “De la rétroactivité en droit international public”, *Recueil d'études de droit international public en hommage à Paul Guggenheim* (Geneva, Faculté de droit, Institut universitaire de hautes études internationales, 1968), p. 184; M. Sørensen, “Le problème intertemporel dans l'application de la Convention européenne des droits de l'homme”, *Mélanges offerts à Polys Modinos* (Paris, Pedone, 1968), p. 304; T.O. Elias, “The Doctrine of Intertemporal Law”, *A.J.I.L.*, vol. 74 (1980), p. 285; R. Higgins, “Time and the Law”, *I.C.L.Q.*, vol. 46 (1997), p. 501.

(6) Accordingly it is appropriate to apply the intertemporal principle to all international obligations, and article 13 is general in its application. It is however without prejudice to the possibility that a State may agree to compensate for damage caused as a result of conduct which was not at the time a breach of any international obligation in force for that State. In fact cases of the retrospective assumption of responsibility are rare. The *lex specialis* principle (article 55) is sufficient to deal with any such cases where it may be agreed or decided that responsibility will be assumed retrospectively for conduct which was not a breach of an international obligation at the time it was committed.²⁴³

(7) In international law, the principle stated in article 13 is not only a necessary but also a sufficient basis for responsibility. In other words, once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law. Thus, as the International Court said in the *Northern Cameroons* case:

“... if during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust”.²⁴⁴

Similarly, in the *Rainbow Warrior* arbitration, the Arbitral Tribunal held that, although the relevant treaty obligation had terminated with the passage of time, France’s responsibility for its earlier breach remained.²⁴⁵

(8) Both aspects of the principle are implicit in the decision of the International Court in *Certain Phosphate Lands in Nauru*. Australia argued there that a State responsibility claim relating to the period of its joint administration of the Trust Territory for Nauru (1947-1968)

²⁴³ As to the retroactive effect of the acknowledgement and adoption of conduct by a State, see article 11 and commentary, esp. para. (4). Such acknowledgement and adoption would not, without more, give retroactive effect to the obligations of the adopting State.

²⁴⁴ *Northern Cameroons, Preliminary Objections, I.C.J. Reports 1963, P. 15, at p. 35.*

²⁴⁵ *Rainbow Warrior (New Zealand/France), UNRIIAA, vol. XX, p. 217 (1990), at pp. 265-266.*

could not be brought decades later, even if the claim had not been formally waived. The Court rejected the argument, applying a liberal standard of laches or unreasonable delay.²⁴⁶ But it went on to say that:

“it will be for the Court, in due time, to ensure that Nauru’s delay in seising it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law.”²⁴⁷

Evidently the Court intended to apply the law in force at the time the claim arose. Indeed that position was necessarily taken by Nauru itself, since its claim was based on a breach of the Trusteeship Agreement, which terminated at the date of its accession to independence in 1968. Its claim was that the responsibility of Australia, once engaged under the law in force at a given time, continued to exist even if the primary obligation had subsequently terminated.²⁴⁸

(9) The basic principle stated in article 13 is thus well-established. One possible qualification concerns the progressive interpretation of obligations, by a majority of the Court in the Namibia (*South West Africa*) advisory opinion.²⁴⁹ But the intertemporal principle does not entail that treaty provisions are to be interpreted as if frozen in time. The evolutionary interpretation of treaty provisions is permissible in certain cases²⁵⁰ but this has nothing to do with the principle that a State can only be held responsible for breach of an obligation which was in force for that State at the time of its conduct. Nor does the principle of the intertemporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant. For example, in dealing with the obligation to

²⁴⁶ *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections*, *I.C.J. Reports 1992*, p. 240, at pp. 253-255, paras. 31-36. See article 45 (b) and commentary.

²⁴⁷ *I.C.J. Reports 1992*, p. 240, at p. 255, para. 36.

²⁴⁸ The case was settled before the Court had the opportunity to consider the merits: *I.C.J. Reports 1993*, p. 322; for the Settlement Agreement of 10 August 1993, see United Nations, *Treaty Series*, vol. 1770, p. 379.

²⁴⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *I.C.J. Reports 1971*, p. 16, at pp. 31-32, para. 53.

²⁵⁰ See, e.g., the dictum of the European Court of Human Rights in *Tyrer v. United Kingdom*, *E.C.H.R., Series A, No. 26 (1978)*, at pp. 15-16.

ensure that persons accused are tried without undue delay, periods of detention prior to the entry into force of that obligation may be relevant as facts, even though no compensation could be awarded in respect of the period prior to the entry into force of the obligation.²⁵¹

Article 14

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Commentary

(1) The problem of identifying when a wrongful act begins and how long it continues is one which arises frequently²⁵² and has consequences in the field of State responsibility, including the important question of cessation of continuing wrongful acts dealt with in article 30. Although the existence and duration of a breach of an international obligation depends for the most part on the existence and content of the obligation and on the facts of the particular breach, certain basic

²⁵¹ See, e.g., *Zana v. Turkey*, *E.C.H.R. Reports*, 1997-VII, p. 2533; J. Pauwelyn, “The Concept of a ‘Continuing Violation’ of an International Obligation: Selected Problems”, *B.Y.I.L.*, vol. 66 (1995), p. 415, at pp. 443-445.

²⁵² See, e.g., *Mavrommatis Palestine Concessions*, 1924, *P.C.I.J.*, Series A, No. 2, p. 35; *Phosphates in Morocco*, *Preliminary Objections*, 1938, *P.C.I.J.*, Series A/B, No. 74, p. 10, at pp. 23-29; *Electricity Company of Sofia and Bulgaria*, 1939, *P.C.I.J.*, Series A/B, No. 77, p. 64, at pp. 80-82; *Right of Passage over Indian Territory*, *Merits*, *I.C.J. Reports* 1960, p. 6, at pp. 33-36. The issue has often been raised before the organs of the European Convention on Human Rights. See, e.g., the decision of the Commission in the *De Becker v. Belgium*, (1958-1959) 2 *E.C.H.R. Yearbook*, p. 214, at pp. 234, 244; and the Court’s judgments in *Ireland v. United Kingdom*, *E.C.H.R.*, Series A, No. 25 (1978), p. 64; *Papamichalopoulos and Others v. Greece*, *E.C.H.R.*, Series A, No. 260-B (1993), para. 40; *Agrotexim v. Greece*, *E.C.H.R.*, Series A, No. 330-A (1995), at p. 22, para. 58. See also E. Wyler, “Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite”, *R.G.D.I.P.*, vol. 95 (1991), p. 881.

concepts are established. These are introduced in article 14. Without seeking to be comprehensive in its treatment of the problem, article 14 deals with several related questions. In particular it develops the distinction between breaches not extending in time and continuing wrongful acts (see paragraphs (1) and (2) respectively), and it also deals with the application of that distinction to the important case of obligations of prevention. In each of these cases it takes into account the question of the continuance in force of the obligation breached.

(2) Internationally wrongful acts usually take some time to happen. The critical distinction for the purpose of article 14 is between a breach which is continuing and one which has already been completed. In accordance with paragraph 1, a completed act occurs “at the moment when the act is performed”, even though its effects or consequences may continue. The words “at the moment” are intended to provide a more precise description of the time-frame when a completed wrongful act is performed, without requiring that the act necessarily be completed in a single instant.

(3) In accordance with paragraph 2, a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period.²⁵³ Examples of continuing wrongful acts include the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent.

(4) Whether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case. For example, the Inter-American Court of Human Rights has interpreted forced or involuntary disappearance as a continuing wrongful act, one which continues for as long as the person concerned is unaccounted for.²⁵⁴ The question whether a wrongful taking of property is a completed or continuing act likewise depends to some extent on the content of the primary rule said to have been violated. Where an expropriation is carried out by legal process, with the consequence that title to the property

²⁵³ See above, article 13 and commentary, especially para. (2).

²⁵⁴ *Blake, Inter-Am.Ct.H.R., Series C, No. 36* (1998), para. 67.

concerned is transferred, the expropriation itself will then be a completed act. The position with a de facto, “creeping” or disguised occupation, however, may well be different.²⁵⁵

Exceptionally, a tribunal may be justified in refusing to recognize a law or decree at all, with the consequence that the resulting denial of status, ownership or possession may give rise to a continuing wrongful act.²⁵⁶

(5) Moreover, the distinction between completed and continuing acts is a relative one. A continuing wrongful act itself can cease: thus a hostage can be released, or the body of a disappeared person returned to the next of kin. In essence a continuing wrongful act is one which has been commenced but has not been completed at the relevant time. Where a continuing wrongful act has ceased, for example by the release of hostages or the withdrawal of forces from territory unlawfully occupied, the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue. In this respect it is covered by paragraph 1 of article 14.

(6) An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution, as required by Part Two of the Articles. The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.

(7) The notion of continuing wrongful acts is common to many national legal systems and owes its origins in international law to Triepel.²⁵⁷ It has been repeatedly referred to by the

²⁵⁵ *Papamichalopoulos v. Greece*, E.C.H.R., Series A, No. 260-B (1993).

²⁵⁶ *Loizidou v. Turkey*, Merits, E.C.H.R. Reports 1996-VI, p. 2216.

²⁵⁷ H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899), p. 289. The concept was subsequently taken up in various general studies on State responsibility as well as in works on the interpretation of the formula “situations or facts prior to a given date” used in some declarations of acceptance of the compulsory jurisdiction of the International Court of Justice.

International Court and by other international tribunals. For example in the *Diplomatic and Consular Staff* case, the Court referred to “successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963”.²⁵⁸

(8) The consequences of a continuing wrongful act will depend on the context, as well as on the duration of the obligation breached. For example, the *Rainbow Warrior* arbitration involved the failure of France to detain two agents on the French Pacific island of Hao for a period of three years, as required by an agreement between France and New Zealand. The Arbitral Tribunal referred with approval to the Commission’s draft articles (now amalgamated in article 14) and to the distinction between instantaneous and continuing wrongful acts, and said:

“Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach. And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features.”²⁵⁹

The Tribunal went on to draw further legal consequences from the distinction in terms of the duration of French obligations under the agreement.²⁶⁰

(9) The notion of continuing wrongful acts has also been applied by the European Court of Human Rights to establish its jurisdiction *ratione temporis* in a series of cases. The issue arises because the Court’s jurisdiction may be limited to events occurring after the respondent State became a party to the Convention or the relevant Protocol and accepted the right of individual petition. Thus in *Papamichalopoulos and Others v. Greece*, a seizure of property not involving formal expropriation occurred some eight years before Greece recognized the Court’s

²⁵⁸ *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, p. 3, at p. 37, para. 80. See also p. 37, para. 78.

²⁵⁹ *Rainbow Warrior (New Zealand/France)*, UNRIAA, vol. XX, p. 217 (1990), at p. 264, para. 101.

²⁶⁰ *Ibid.*, at pp. 265-266, paras 105-106. But see the dissenting opinion of Sir Kenneth Keith, *ibid.*, pp. 279-284.

competence. The Court held that there was a continuing breach of the right to peaceful enjoyment of property under article 1 of Protocol 1 to the Convention, which continued after the Protocol had come into force; it accordingly upheld its jurisdiction over the claim.²⁶¹

(10) In *Loizidou v. Turkey*,²⁶² similar reasoning was applied by the Court to the consequences of the Turkish invasion of Cyprus in 1974, as a result of which the applicant was denied access to her property in northern Cyprus. Turkey argued that under article 159 of the Constitution of the Turkish Republic of Northern Cyprus of 1985, the property in question had been expropriated, and this had occurred prior to Turkey's acceptance of the Court's jurisdiction in 1990. The Court held that, in accordance with international law and having regard to the relevant Security Council resolutions, it could not attribute legal effect to the 1985 Constitution so that the expropriation was not completed at that time and the property continued to belong to the Applicant. The conduct of the TRNC and of Turkish troops in denying the applicant access to her property continued after Turkey's acceptance of the Court's jurisdiction, and constituted a breach of article 1 of Protocol 1 after that time.²⁶³

(11) The Human Rights Committee has likewise endorsed the idea of continuing wrongful acts. For example, in *Lovelace v. Canada*, it held it had jurisdiction to examine the continuing effects for the applicant of the loss of her status as a registered member of an Indian group, although the loss had occurred at the time of her marriage in 1970 and Canada only accepted the Committee's jurisdiction in 1976. The Committee noted that it was ...

“not competent, as a rule, to examine allegations relating to events having taken place before the entry into force of the Covenant and the Optional Protocol ... In the case of Sandra Lovelace it follows that the Committee is not competent to express any view on the original cause of her loss of Indian status ... at the time of her marriage in 1970 ...

²⁶¹ *Papamichalopoulos and Others v. Greece*, E.C.H.R., Series A, No. 260-B (1993).

²⁶² *Loizidou v. Turkey*, Merits, E.C.H.R. Reports 1996-VI, p. 2216.

²⁶³ Ibid., at pp. 2230-2232, 2237-2238 paras. 41-47, 63-64. See however the dissenting judgment of Judge Bernhardt, ibid., 2242, para. 2 (with whom Judges Lopes Rocha, Jambrek, Pettiti, Baka and Gölcüklü in substance agreed). See also *Loizidou v. Turkey (Preliminary Objections)* E.C.H.R., Series A, No. 310 (1995), at pp. 33-34, paras. 102-105; *Cyprus v. Turkey* (Application No. 25781/94), E.C.H.R., judgment of 10 May 2001.

The Committee recognizes, however, that the situation may be different if the alleged violations, although relating to events occurring before 19 August 1976, continue, or have effects which themselves constitute violations, after that date.”²⁶⁴

It found that the continuing impact of Canadian legislation, in preventing Lovelace from exercising her rights as a member of a minority, was sufficient to constitute a breach of article 27 of the Covenant after that date. Here the notion of a continuing breach was relevant not only to the Committee’s jurisdiction but also to the application of article 27 as the most directly relevant provision of the Covenant to the facts in hand.

(12) Thus conduct which has commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can continue and give rise to a continuing wrongful act in the present. Moreover, this continuing character can have legal significance for various purposes, including State responsibility. For example, the obligation of cessation contained in article 30 applies to continuing wrongful acts.

(13) A question common to wrongful acts whether completed or continuing is when a breach of international law occurs, as distinct from being merely apprehended or imminent. As noted in the context of article 12, that question can only be answered by reference to the particular primary rule. Some rules specifically prohibit threats of conduct,²⁶⁵ incitement or attempt,²⁶⁶ in which case the threat, incitement or attempt is itself a wrongful act. On the other hand where the internationally wrongful act is the occurrence of some event - e.g. the diversion of an

²⁶⁴ *Lovelace v. Canada*, Communication No. R.6/24, *G.A.O.R.*, *Thirty-sixth Session, Supplement No. 40* (A/36/40) (1981), p. 166, at p. 172, paras. 10-11.

²⁶⁵ Notably, Article 2, paragraph 4, of the Charter of the United Nations prohibits the “threat or use of force against the territorial integrity or political independence of any State”. For the question of what constitutes a threat of force, see *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, p. 226, at pp. 246–247, paras. 47–48; cf. R. Sadurska, “Threats of Force”, *A.J.I.L.*, vol. 82 (1988), p. 239.

²⁶⁶ A particularly comprehensive formulation is that of article III of the Genocide Convention of 1948, which prohibits conspiracy, direct and public incitement, attempt and complicity in relation to genocide. See too: article 2 of the International Convention for the Suppression of Terrorist Bombings of 1997, A/RES/52/164, and article 2 of the International Convention for the Suppression of the Financing of Terrorism of 1999, A/RES/54/109.

international river - mere preparatory conduct is not necessarily wrongful.²⁶⁷ In the *Gabčíkovo-Nagymaros Project* case, the question was when the diversion scheme (“Variant C”) was put into effect. The Court held that the breach did not occur until the actual diversion of the Danube. It noted ...

“that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied. Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which ‘does not qualify as a wrongful act’...”²⁶⁸

Thus the Court distinguished between the actual commission of a wrongful act and conduct of a preparatory character. Preparatory conduct does not itself amount to a breach if it does not “predetermine the final decision to be taken”. Whether that is so in any given case will depend

²⁶⁷ In some legal systems, the notion of “anticipatory breach” is used to deal with the definitive refusal by a party to perform a contractual obligation, in advance of the time laid down for its performance. Confronted with an anticipatory breach, the party concerned is entitled to terminate the contract and sue for damages. See K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (3rd edn.) (trans. J.A. Weir) (Oxford, Oxford University Press, 1998), p. 508. Other systems achieve similar results without using this concept, e.g. by construing a refusal to perform in advance of the time for performance as a “positive breach of contract”: *ibid.*, p. 494 (German law). There appears to be no equivalent in international law, but article 60 (3) (a) of the Vienna Convention on the Law of Treaties defines a material breach as including “a repudiation ... not sanctioned by the present Convention”. Such a repudiation could occur in advance of the time for performance.

²⁶⁸ *Gabčíkovo-Nagymaros Project*, *I.C.J. Reports* 1997, p. 7, at p. 54, para. 79, citing the draft commentary to what is now article 30.

on the facts and on the content of the primary obligation. There will be questions of judgement and degree, which it is not possible to determine in advance by the use of any particular formula. The various possibilities are intended to be covered by the use of the term “occurs” in paragraphs 1 and 3 of article 14.

(14) Paragraph 3 of article 14 deals with the temporal dimensions of a particular category of breaches of international obligations, namely the breach of obligations to prevent the occurrence of a given event. Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur. The breach of an obligation of prevention may well be a continuing wrongful act, although, as for other continuing wrongful acts, the effect of article 13 is that the breach only continues if the State is bound by the obligation for the period during which the event continues and remains not in conformity with what is required by the obligation. For example, the obligation to prevent transboundary damage by air pollution, dealt with in the *Trail Smelter* arbitration,²⁶⁹ was breached for as long as the pollution continued to be emitted. Indeed, in such cases the breach may be progressively aggravated by the failure to suppress it. However, not all obligations directed to preventing an act from occurring will be of this kind. If the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), there will be no continuing wrongful act.²⁷⁰ If the obligation in question has ceased, any continuing conduct by definition ceases to be wrongful at that time.²⁷¹ Both qualifications are intended to be covered by the phrase in paragraph 3, “and remains not in conformity with that obligation”.

²⁶⁹ *UNRIAA*, vol. III, p. 1905 (1938, 1941).

²⁷⁰ An example might be an obligation by State A to prevent certain information from being published. The breach of such an obligation will not necessarily be of a continuing character, since it may be that once the information is published, the whole point of the obligation is defeated.

²⁷¹ Cf. the *Rainbow Warrior* arbitration, *UNRIAA*, vol. XX, p. 217(1990), at p. 266.

Article 15

Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Commentary

- (1) Within the basic framework established by the distinction between completed and continuing acts in article 14, article 15 deals with a further refinement, viz. the notion of a composite wrongful act. Composite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct.
- (2) Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words their focus is “a series of acts or omissions defined in aggregate as wrongful”. Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc. Some of the most serious wrongful acts in international law are defined in terms of their composite character. The importance of these obligations in international law justifies special treatment in article 15.²⁷²
- (3) Even though it has special features, the prohibition of genocide, formulated in identical terms in the 1948 Convention and in later instruments,²⁷³ may be taken as an illustration of a

²⁷² See further J. Salmon, “Le fait étatique complexe: une notion contestable”, *A.F.D.I.*, vol. XXVIII (1982), p. 709.

²⁷³ See, e.g., art. 4 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993 (originally published as an Annex to S/25704 and Add.1, approved by the Security Council by Resolution 827 (1993); amended 13 May 1998 by Resolution 1166 (1998) and 30 November 2000 by Resolution 1329 (2000)); art. 2 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for such Violations Committed in

“composite” obligation. It implies that the responsible entity (including a State) will have adopted a systematic policy or practice. According to article II (a) of the Convention, the prime case of genocide is “killing members of [a national, ethnical, racial or religious group]” with the intent to destroy that group as such, in whole or in part. Both limbs of the definition contain systematic elements. Genocide also has to be carried out with the relevant intention, aimed at physically eliminating the group “as such”. Genocide is not committed until there has been an accumulation of acts of killing, causing harm, etc., committed with the relevant intent, so as to satisfy the definition in article II. Once that threshold is crossed, the time of commission extends over the whole period during which any of the acts was committed, and any individual responsible for any of them with the relevant intent will have committed genocide.²⁷⁴

(4) It is necessary to distinguish composite obligations from simple obligations breached by a “composite” act. Composite acts may be more likely to give rise to continuing breaches, but simple acts can cause continuing breaches as well. The position is different, however, where the obligation itself is defined in terms of the cumulative character of the conduct, i.e. where the cumulative conduct constitutes the essence of the wrongful act. Thus apartheid is different in kind from individual acts of racial discrimination, and genocide is different in kind from individual acts even of ethnically or racially motivated killing.

(5) In *Ireland v. United Kingdom* Ireland complained of a practice of unlawful treatment of detainees in Northern Ireland which were said to amount to torture or inhuman or degrading treatment, and the case was held to be admissible on that basis. This had various procedural and remedial consequences. In particular, the exhaustion of local remedies rule did not have to be complied with in relation to each of the incidents cited as part of the practice. But the Court

the Territory of Neighbouring States, 8 November 1994, approved by the Security Council by Resolution 955 (1994); and art. 6 of the Rome Statute of the International Criminal Court, 17 July 1998 (A/CONF.183/9).

²⁷⁴ The intertemporal principle does not apply to the Genocide Convention, which according to article I of the Convention is declaratory. Thus the obligation to prosecute relates to genocide whenever committed. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, I.C.J. Reports 1996, p. 595, at p. 617, para. 34.

denied that there was any separate wrongful act of a systematic kind involved. It was simply that Ireland was entitled to complain of a practice made up by a series of breaches of article 7 of the Convention, and to call for its cessation. As the Court said:

“A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or system; *a practice does not of itself constitute a violation separate from such breaches* ... The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies. This rule, as embodied in article 26 of the Convention, applies to State applications ... in the same way as it does to ‘individual’ applications ... On the other hand and in principle, the rule does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Commission or the Court to give a decision on each of the cases put forward as proof or illustrations of that practice.”²⁷⁵

In the case of crimes against humanity, the composite act is a violation separate from the individual violations of human rights of which it is composed.

(6) A further distinction must be drawn between the necessary elements of a wrongful act and what might be required by way of evidence or proof that such an act has occurred. For example, an individual act of racial discrimination by a State is internationally wrongful,²⁷⁶ even though it may be necessary to adduce evidence of a series of acts by State officials (involving the same person or other persons similarly situated) in order to show that any one of those acts was discriminatory rather than actuated by legitimate grounds. In its essence such discrimination is not a composite act, but it may be necessary for the purposes of proving it to produce evidence of a practice amounting to such an act.

²⁷⁵ *E.C.H.R., Series A, No. 25* (1978), at p. 64, para. 159 (emphasis added); see also *ibid.*, at p. 63, para. 157. See also the United States counterclaim in *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Counter-Claim, I.C.J. Reports 1998*, p. 190, which likewise focuses on a general situation rather than specific instances.

²⁷⁶ See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, United Nations, *Treaty Series*, vol. 660, p. 195, art. 2; International Covenant on Civil and Political Rights, United Nations *Treaty Series*, vol. 999, p. 171, art. 26.

(7) A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful.

(8) Paragraph 1 of article 15 defines the time at which a composite act “occurs” as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series. Similar considerations apply as for completed and continuing wrongful acts in determining when a breach of international law exists; the matter is dependent upon the precise facts and the content of the primary obligation. The number of actions or omissions which must occur to constitute a breach of the obligation, is also determined by the formulation and purpose of the primary rule. The actions or omissions must be part of a series but the article does not require that the whole series of wrongful acts has to be committed in order to fall into the category of a composite wrongful act, provided a sufficient number of acts has occurred to constitute a breach. At the time when the act occurs which is sufficient to constitute the breach it may not be clear that further acts are to follow and that the series is not complete. Further, the fact that the series of actions or omissions was interrupted so that it was never completed will not necessarily prevent those actions or omissions which have occurred being classified as a composite wrongful act if, taken together, they are sufficient to constitute the breach.

(9) While composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation. For example the wrongful act of genocide is generally made up of a series of acts which are themselves internationally wrongful. Nor does it affect the temporal element in the commission of the acts: a series of acts or omissions may occur at the same time or sequentially, at different times.

(10) Paragraph 2 of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but

at that point the act should be regarded as having occurred over the whole period from the commission of the first action or omission. If this were not so, the effectiveness of the prohibition would thereby be undermined.

(11) The word “remain” in paragraph 2 is inserted to deal with the intertemporal principle set out in article 13. In accordance with that principle, the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the “first” of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. This need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent).

Chapter IV

Responsibility of a State in connection with the act of another State

(1) In accordance with the basic principles laid down in chapter I, each State is responsible for its own internationally wrongful conduct, i.e. for conduct attributable to it under chapter II which is in breach of an international obligation of that State in accordance with chapter III.²⁷⁷ The principle that State responsibility is specific to the State concerned underlies the present Articles as a whole. It will be referred to as the principle of independent responsibility. It is appropriate since each State has its own range of international obligations and its own correlative responsibilities.

(2) However, internationally wrongful conduct often results from the collaboration of several States rather than of one State acting alone.²⁷⁸ This may involve independent conduct by several States, each playing its own role in carrying out an internationally wrongful act. Or it may be

²⁷⁷ See especially article 2 and commentary.

²⁷⁸ See M.L. Padelletti, *Pluralità di Stati nel Fatto Illecito Internazionale* (Milan, Giuffrè, 1990); I. Brownlie, *System of the Law of Nations: State Responsibility (Part I)* (Oxford, Clarendon Press, 1983), pp. 189-192; J. Quigley, “Complicity in International Law: A New Direction in the Law of State Responsibility”, *B.Y.I.L.*, vol. 57 (1986), p. 77; J.E. Noyes & B.D. Smith, “State Responsibility and the Principle of Joint and Several Liability”, *Yale Journal of International Law*, vol. 13 (1988), p. 225; B. Graefrath, “Complicity in the Law of International Responsibility”, *Revue belge de droit international*, vol. 29 (1996), p. 370.

that a number of States act through a common organ to commit a wrongful act.²⁷⁹ Internationally wrongful conduct can also arise out of situations where a State acts on behalf of another State in carrying out the conduct in question.

(3) Various forms of collaborative conduct can coexist in the same case. For example, three States, Australia, New Zealand and the United Kingdom, together constituted the Administering Authority for the Trust Territory of Nauru. In *Certain Phosphate Lands in Nauru* proceedings were commenced against Australia alone in respect of acts performed on the “joint behalf” of the three States.²⁸⁰ The acts performed by Australia involved both “joint” conduct of several States and day-to-day administration of a territory by one State acting on behalf of other States as well as on its own behalf. By contrast, if the relevant organ of the acting State is merely “placed at the disposal” of the requesting State, in the sense provided for in article 6, only the requesting State is responsible for the act in question.

(4) In certain circumstances the wrongfulness of a State’s conduct may depend on the independent action of another State. A State may engage in conduct in a situation where another State is involved and the conduct of the other State may be relevant or even decisive in assessing whether the first State has breached its own international obligations. For example in the *Soering* case the European Court of Human Rights held that the proposed extradition of a person to a State not party to the European Convention where he was likely to suffer inhuman or degrading treatment or punishment involved a breach of article 3 of the Convention by the extraditing State.²⁸¹ Alternatively a State may be required by its own international obligations to prevent certain conduct by another State, or at least to prevent the harm that would flow from

²⁷⁹ In some cases the act in question may be committed by the organs of an international organization. This raises issues of the international responsibility of international organizations which fall outside the scope of the present articles. See article 57 and commentary.

²⁸⁰ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, *I.C.J. Reports 1992*, p. 240, at p. 258, para. 47; see also the separate opinion of Judge Shahabuddeen, *ibid.*, p. 284.

²⁸¹ *Soering v. United Kingdom*, *E.C.H.R., Series A, No. 161 (1989)*, at pp. 33-36, paras. 85-91. See also *Cruz Varas v. Sweden*, *E.C.H.R., Series A, No. 201 (1991)*, at p. 28, paras. 69-70; *Vilvarajah v. United Kingdom*, *E.C.H.R., Series A, No. 215 (1991)*, at p. 37, paras. 115-116.

such conduct. Thus the basis of responsibility in the *Corfu Channel* case²⁸² was Albania's failure to warn the United Kingdom of the presence of mines in Albanian waters which had been laid by a third State. Albania's responsibility in the circumstances was original and not derived from the wrongfulness of the conduct of any other State.

(5) In most cases of collaborative conduct by States, responsibility for the wrongful act will be determined according to the principle of independent responsibility referred to in paragraph (1) above. But there may be cases where conduct of the organ of one State, not acting as an organ or agent of another State, is nonetheless chargeable to the latter State, and this may be so even though the wrongfulness of the conduct lies, or at any rate primarily lies, in a breach of the international obligations of the former. Chapter IV of Part One defines these exceptional cases where it is appropriate that one State should assume responsibility for the internationally wrongful act of another.

(6) Three situations are covered in chapter IV. Article 16 deals with cases where one State provides aid or assistance to another State with a view to assisting in the commission of a wrongful act by the latter. Article 17 deals with cases where one State is responsible for the internationally wrongful act of another State because it has exercised powers of direction and control over the commission of an internationally wrongful act by the latter. Article 18 deals with the extreme case where one State deliberately coerces another into committing an act which is, or but for the coercion would be,²⁸³ an internationally wrongful act on the part of the coerced State. In all three cases, the act in question is still committed, voluntarily or otherwise, by organs or agents of the acting State, and is or, but for the coercion, would be a breach of that State's international obligations. The implication of the second State in that breach arises from the special circumstance of its willing assistance in, its direction and control over or its coercion of the acting State. But there are important differences between the three cases. Under article 16, the State primarily responsible is the acting State and the assisting State has a merely supporting role. Similarly under article 17, the acting State commits the internationally wrongful act, albeit

²⁸² *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 4, at p. 22.

²⁸³ If a State has been coerced, the wrongfulness of its act may be precluded by *force majeure*: see article 23 and commentary.

under the direction and control of another State. By contrast, in the case of coercion under article 18, the coercing State is the prime mover in respect of the conduct and the coerced State is merely its instrument.

(7) A feature of this chapter is that it specifies certain conduct as internationally wrongful. This may seem to blur the distinction maintained in the articles between the primary or substantive obligations of the State and its secondary obligations of responsibility.²⁸⁴ It is justified on the basis that responsibility under chapter IV is in a sense derivative.²⁸⁵ In national legal systems, rules dealing, for example, with conspiracy, complicity and inducing breach of contract may be classified as falling within the “general part” of the law of obligations. Moreover, the idea of the implication of one State in the conduct of another is analogous to problems of attribution, dealt with in chapter II.

(8) On the other hand, the situations covered in chapter IV have a special character. They are exceptions to the principle of independent responsibility and they only cover certain cases. In formulating these exceptional cases where one State is responsible for the internationally wrongful acts of another, it is necessary to bear in mind certain features of the international system. First, there is the possibility that the same conduct may be internationally wrongful so far as one State is concerned but not for another State having regard to its own international obligations. Rules of derived responsibility cannot be allowed to undermine the principle, stated in article 34 of the Vienna Convention on the Law of Treaties, that a treaty “does not create either obligations or rights for a third State without its consent”; similar issues arise with respect to unilateral obligations and even, in certain cases, rules of general international law. Hence it is only in the extreme case of coercion that a State may become responsible under this chapter for conduct which would not have been internationally wrongful if performed by that State. Secondly, States engage in a wide variety of activities through a multiplicity of organs and agencies. For example, a State providing financial or other aid to another State should not be required to assume the risk that the latter will divert the aid for purposes which may be

²⁸⁴ See above, Introduction to the articles, paras. (1), (2), (4) for an explanation of the distinction.

²⁸⁵ Cf. the term “responsabilité dérivée” used by Arbitrator Huber in *British Claims in the Spanish Zone of Morocco*, UNRIIA, vol. II, p. 615 (1924), at p. 648.

internationally unlawful. Thus it is necessary to establish a close connection between the action of the assisting, directing or coercing State on the one hand and that of the State committing the internationally wrongful act on the other. Thus the articles in this Part require that the former State should be aware of the circumstances of the internationally wrongful act in question, and establish a specific causal link between that act and the conduct of the assisting, directing or coercing State. This is done without prejudice to the general question of “wrongful intent” in matters of State responsibility, on which the articles are neutral.²⁸⁶

(9) Similar considerations dictate the exclusion of certain situations of “derived responsibility” from chapter IV. One of these is incitement. The incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support or does not involve direction and control on the part of the inciting State.²⁸⁷ However, there can be specific treaty obligations prohibiting incitement under certain circumstances.²⁸⁸ Another concerns the issue which is described in some systems of internal law as being an “accessory after the fact”. It seems that there is no general obligation on the part of third States to cooperate in suppressing internationally wrongful conduct of another State which may already have occurred. Again it is a matter for specific treaty obligations to establish any such obligation of suppression after the event. There are, however, two important qualifications here. First, in some circumstances assistance given by one State to another after the latter has committed an internationally wrongful act may amount to the adoption of that act by the former State. In such cases responsibility for that act potentially arises pursuant to article 11. Secondly, special obligations of cooperation in putting an end to an

²⁸⁶ See above, commentary to article 2, paras. (3) and (10).

²⁸⁷ See the statement of the United States-French Commissioners relating to the *French Indemnity of 1831*, in Moore, *International arbitrations*, vol. V, p. 4399, at pp. 4473-4476. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, *I.C.J. Reports 1986*, p. 14, at p. 129, para. 255, and the dissenting opinion of Judge Schwebel, *ibid.*, p. 379, para. 259.

²⁸⁸ Cf., e.g., art. III (c) of the Convention on the Prevention and Punishment of the Crime of Genocide, United Nations, *Treaty Series*, vol. 78, p. 277; art. 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, vol. 660, p. 195.

unlawful situation arise in the case of serious breaches of obligations under peremptory norms of general international law. By definition, in such cases States will have agreed that no derogation from such obligations is to be permitted and, faced with a serious breach of such an obligation, certain obligations of cooperation arise. These are dealt with in article 41.

Article 16

Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Commentary

(1) Article 16 deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter. Such situations arise where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question. Other examples include providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country. The State primarily responsible in each case is the acting State, and the assisting State has only a supporting role. Hence the use of the term “by the latter” in the chapeau to article 16, which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act. Under article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State. In such a case, the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.

(2) Various specific substantive rules exist, prohibiting one State from providing assistance in the commission of certain wrongful acts by other States or even requiring third States to prevent or repress such acts.²⁸⁹ Such provisions do not rely on any general principle of derived responsibility, nor do they deny the existence of such a principle, and it would be wrong to infer from them the non-existence of any general rule. As to treaty provisions such as Article 2, paragraph (5) of the United Nations Charter, again these have a specific rationale which goes well beyond the scope and purpose of article 16.

(3) Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.

(4) The requirement that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful is reflected by the phrase “knowledge of the circumstances of the internationally wrongful act”. A State providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act. If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.

(5) The second requirement is that the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.

²⁸⁹ See, e.g., G.A. Res. 2625 (XXV) of 24 October 1970, first principle, para. 9; G.A. Res. 3314 (XXIX), annex, para. 3 (f).

(6) The third condition limits article 16 to aid or assistance in the breach of obligations by which the aiding or assisting State is itself bound. An aiding or assisting State may not deliberately procure the breach by another State of an obligation by which both States are bound; a State cannot do by another what it cannot do by itself. On the other hand, a State is not bound by obligations of another State vis-à-vis third States. This basic principle is also embodied in articles 34 and 35 of the Vienna Convention on the Law of Treaties.²⁹⁰ Correspondingly, a State is free to act for itself in a way which is inconsistent with obligations of another State vis-à-vis third States. Any question of responsibility in such cases will be a matter for the State to whom assistance is provided vis-à-vis the injured State. Thus it is a necessary requirement for the responsibility of an assisting State that the conduct in question, if attributable to the assisting State, would have constituted a breach of its own international obligations.

(7) State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting State. For example, in 1984 Iran protested against the supply of financial and military aid to Iraq by the United Kingdom, which allegedly included chemical weapons used in attacks against Iranian troops, on the ground that the assistance was facilitating acts of aggression by Iraq.²⁹¹ The British Government denied both the allegation that it had chemical weapons and that it had supplied them to Iraq.²⁹² In 1998, a similar allegation surfaced that Sudan had assisted Iraq to manufacture chemical weapons by allowing Sudanese installations to be used by Iraqi technicians for steps in the production of nerve gas. The allegation was denied by Iraq's representative to the United Nations.²⁹³

(8) The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State. An example is provided by a statement made by the Government of the Federal Republic

²⁹⁰ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, 1155, p. 331.

²⁹¹ See *New York Times*, 6 March 1984, p. A1, col. 1.

²⁹² See *New York Times*, 5 March 1984, p. A3, col. 1.

²⁹³ See *New York Times*, 26 August 1998, p. A8, col. 1.

of Germany in response to an allegation that Germany had participated in an armed attack by allowing United States military aircraft to use airfields in its territory in connection with the United States intervention in Lebanon. While denying that the measures taken by the United States and the United Kingdom in the Near East constituted intervention, the Federal Republic of Germany nevertheless seems to have accepted that the act of a State in placing its own territory at the disposal of another State in order to facilitate the commission of an unlawful use of force by that other State was itself an internationally wrongful act.²⁹⁴ Another example arises from the Tripoli bombing incident in April 1986. Libya charged the United Kingdom with responsibility for the event, based on the fact that the United Kingdom had allowed several of its air bases to be used for the launching of American fighter planes to attack Libyan targets.²⁹⁵ Libya asserted that the United Kingdom “would be held partly responsible” for having “supported and contributed in a direct way” to the raid.²⁹⁶ The United Kingdom denied responsibility on the basis that the raid by the United States was lawful as an act of self-defence against Libyan terrorist attacks on American targets.²⁹⁷ A proposed Security Council resolution concerning the attack was vetoed, but the United Nations General Assembly issued a resolution condemning the “military attack” as “a violation of the Charter of the United Nations and of international law”, and calling upon all States “to refrain from extending any assistance or facilities for perpetrating acts of aggression against the Libyan Arab Jamahiriya”.²⁹⁸

(9) The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it assists another State to circumvent sanctions

²⁹⁴ For the text of the note see *Z.a.ö.R.V.*, vol. 20 (1960), pp. 663-664.

²⁹⁵ See United States of America, *Department of State Bulletin*, No. 2111, June 1986, p. 8.

²⁹⁶ See the statement of Ambassador Hamed Houdeiry, Libyan People’s Bureau, Paris, *The Times*, 16 April 1986, p. 6, col. 7.

²⁹⁷ Statement of Mrs. Margaret Thatcher, Prime Minister, *House of Commons Debates*, 6th series, vol. 95, col. 737 (15 April 1986), reprinted in *B.Y.I.L.*, vol. 57 (1986), p. 638.

²⁹⁸ See G.A. Res. 41/38 of 20 November 1986, paras. 1, 3.

imposed by the United Nations Security Council²⁹⁹ or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the United Nations General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.³⁰⁰

Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.

(10) In accordance with article 16, the assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible, as such, for the act of the assisted State. In some cases this may be a distinction without a difference: where the assistance is a necessary element in the wrongful act in absence of which it could not have occurred, the injury suffered can be concurrently attributed to the assisting and the acting State.³⁰¹ In other cases, however, the difference may be very material: the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered. By assisting another State to commit an internationally wrongful act, a State should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which, in accordance with the principles stated in Part Two of the articles, flow from its own conduct.

(11) Article 16 does not address the question of the admissibility of judicial proceedings to establish the responsibility of the aiding or assisting State in the absence of or without the consent of the aided or assisted State. The International Court has repeatedly affirmed that it cannot decide on the international responsibility of a State if, in order to do so, “it would have to

²⁹⁹ See, e.g., Report by President Clinton, *A.J.I.L.*, vol. 91 (1997), p. 709.

³⁰⁰ *Report of the Economic and Social Council, Report of the Third Committee of the General Assembly*, draft resolution XVII, 14 December 1982, A/37/745, p. 50.

³⁰¹ For the question of concurrent responsibility of several States for the same injury see article 47 and commentary.

rule, as a prerequisite, on the lawfulness³⁰² of the conduct of another State, in the latter's absence and without its consent. This is the so-called *Monetary Gold* principle.³⁰³ That principle may well apply to cases under article 16, since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act. The wrongfulness of the aid or assistance given by the former is dependent, *inter alia*, on the wrongfulness of the conduct of the latter. This may present practical difficulties in some cases in establishing the responsibility of the aiding or assisting State, but it does not vitiate the purpose of article 16. The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings, not with questions of responsibility as such. Moreover that principle is not all-embracing, and the *Monetary Gold* principle may not be a barrier to judicial proceedings in every case. In any event, wrongful assistance given to another State has frequently led to diplomatic protests. States are entitled to assert complicity in the wrongful conduct of another State even though no international court may have jurisdiction to rule on the charge, at all or in the absence of the other State.

Article 17

Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Commentary

(1) Article 17 deals with a second case of derived responsibility, the exercise of direction and control by one State over the commission of an internationally wrongful act by another. Under article 16 a State providing aid or assistance with a view to the commission of an internationally

³⁰² *East Timor (Portugal v. Australia)*, I.C.J. Reports 1995, p. 90, at p. 105, para. 35.

³⁰³ *Monetary Gold Removed from Rome in 1943*, I.C.J. Reports 1954, p. 19, at p. 32; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, I.C.J. Reports 1992, p. 240, at p. 261, para. 55.

wrongful act incurs international responsibility only to the extent of the aid or assistance given. By contrast, a State which directs and controls another in the commission of an internationally wrongful act is responsible for the act itself, since it controlled and directed the act in its entirety.

(2) Some examples of international responsibility flowing from the exercise of direction and control over the commission of a wrongful act by another State are now largely of historical significance. International dependency relationships such as “suzerainty” or “protectorate” warranted treating the dominant State as internationally responsible for conduct formally attributable to the dependent State. For example, in *Rights of Nationals of the United States in Morocco*,³⁰⁴ France commenced proceedings under the Optional Clause in respect of a dispute concerning the rights of United States nationals in Morocco under French protectorate. The United States objected that any eventual judgment might not be considered as binding upon Morocco, which was not a party to the proceedings. France confirmed that it was acting both in its own name and as the protecting power over Morocco, with the result that the Court’s judgment would be binding both on France and on Morocco,³⁰⁵ and the case proceeded on that basis.³⁰⁶ The Court’s judgment concerned questions of the responsibility of France in respect of the conduct of Morocco which were raised both by the Application and by the United States counter-claim.

(3) With the developments in international relations since 1945, and in particular the process of decolonization, older dependency relationships have been terminated. Such links do not involve any legal right to direction or control on the part of the representing State. In cases of representation, the represented entity remains responsible for its own international obligations, even though diplomatic communications may be channelled through another State. The representing State in such cases does not, merely because it is the channel through which

³⁰⁴ *Rights of Nationals of the United States of America in Morocco*, I.C.J. Reports 1952, p. 176.

³⁰⁵ See I.C.J. Pleadings, *Rights of Nationals of the United States of America in Morocco*, vol. I, p. 235; *ibid.*, vol. II, pp. 431-433; the United States thereupon withdrew its preliminary objection: *ibid.*, p. 434.

³⁰⁶ See *Rights of Nationals of the United States of America in Morocco*, I.C.J. Reports 1952, p. 176, at p. 179.

communications pass, assume any responsibility for their content. This is not in contradiction to the *British Claims in the Spanish Zone of Morocco* arbitration, which affirmed that “the responsibility of the protecting State ... proceeds from the fact that the protecting State alone represents the protected territory in its international relations,”³⁰⁷ and that the protecting State is answerable “in place of the protected State.”³⁰⁸ The principal concern in the arbitration was to ensure that, in the case of a protectorate which put an end to direct international relations by the protected State, international responsibility for wrongful acts committed by the protected State was not erased to the detriment of third States injured by the wrongful conduct. The acceptance by the protecting State of the obligation to answer in place of the protected State was viewed as an appropriate means of avoiding that danger.³⁰⁹ The justification for such an acceptance was not based on the relationship of “representation” as such but on the fact that the protecting State was in virtually total control over the protected State. It was not merely acting as a channel of communication.

(4) Other relationships of dependency, such as dependent territories fall entirely outside the scope of article 17, which is concerned only with the responsibility of one State for the conduct of another State. In most relationships of dependency between one territory and another, the dependent territory, even if it may possess some international personality, is not a State. Even in cases where a component unit of a federal State enters into treaties or other international legal relations in its own right, and not by delegation from the federal State, the component unit is not itself a State in international law. So far as State responsibility is concerned, the position of federal States is no different from that of any other States: the normal principles specified in articles 4 to 9 of the draft articles apply, and the federal State is internationally responsible for the conduct of its component units even though that conduct falls within their own local control under the federal constitution.³¹⁰

³⁰⁷ *British Claims in the Spanish Zone of Morocco*, UNRIAA, vol. II, p. 615 (1925), at p. 649 (translation).

³⁰⁸ *Ibid.*, at p. 648.

³⁰⁹ *Ibid.*

³¹⁰ See, e.g., *LaGrand (Germany v. United States of America)*, *Provisional Measures*, I.C.J. Reports 1999, p. 9, at p. 16, para. 28.

(5) Nonetheless, instances exist or can be envisaged where one State exercises the power to direct and control the activities of another State, whether by treaty or as a result of a military occupation or for some other reason. For example, during the belligerent occupation of Italy by Germany in the Second World War, it was generally acknowledged that the Italian police in Rome operated under the control of the occupying Power. Thus the protest by the Holy See in respect of wrongful acts committed by Italian police who forcibly entered the Basilica of St. Paul in Rome in February 1944 asserted the responsibility of the German authorities.³¹¹ In such cases the occupying State is responsible for acts of the occupied State which it directs and controls.

(6) Article 17 is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State. International tribunals have consistently refused to infer responsibility on the part of a dominant State merely because the latter may have the power to interfere in matters of administration internal to a dependent State, if that power is not exercised in the particular case. In the *Robert E. Brown* case,³¹² for example, the Arbitral Tribunal held that the authority of Great Britain, as suzerain over the South African Republic prior to the Boer War, “fell far short of what would be required to make her responsible for the wrong inflicted upon Brown.”³¹³ It went on to deny that Great Britain possessed power to interfere in matters of internal administration and continued that there was no evidence “that Great Britain ever did undertake to interfere in this way.”³¹⁴ Accordingly the relation of suzerainty “did not operate to render Great Britain liable for the acts complained of.”³¹⁵ In the *Heirs of the Duc de Guise* case,³¹⁶ the Franco-Italian Conciliation Commission held that Italy was responsible for a requisition carried out by Italy in Sicily at a

³¹¹ See R. Ago, “L’occupazione bellica di Roma e il Trattato lateranense”, *Comunicazioni e Studi* (Milan, Giuffrè, 1946), vol. II, pp. 167-168.

³¹² *Brown (United States) v. Great Britain*, *UNRIAA*, vol. VI, p. 120 (1923).

³¹³ *Ibid.*, at p. 130.

³¹⁴ *Ibid.*, at p. 131.

³¹⁵ *Ibid.*

³¹⁶ *Heirs of the Duc de Guise*, *UNRIAA*, vol. XIII, p. 150 (1951).

time when it was under Allied occupation. Its decision was not based on the absence of Allied power to requisition the property, or to stop Italy from doing so. Rather the majority pointed to the absence in fact of any “intermeddling on the part of the Commander of the Occupation forces or any Allied authority calling for the requisition decrees”.³¹⁷ The mere fact that a State may have power to exercise direction and control over another State in some field is not a sufficient basis for attributing to it any wrongful acts of the latter State in that field.³¹⁸

(7) In the formulation of article 17, the term “controls” refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word “directs” does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind. Both direction and control must be exercised over the wrongful conduct in order for a dominant State to incur responsibility. The choice of the expression, common in English, “*direction and control*”, raised some problems in other languages, owing in particular to the ambiguity of the term “*direction*” which may imply, as is the case in French, complete power, whereas it does not have this implication in English.

(8) Two further conditions attach to responsibility under article 17. First, the dominant State is only responsible if it has knowledge of the circumstances making the conduct of the dependent State wrongful. Secondly, it has to be shown that the completed act would have been wrongful had it been committed by the directing and controlling State itself. This condition is significant in the context of bilateral obligations, which are not opposable to the directing State. In cases of multilateral obligations and especially of obligations to the international community, it is of much less significance. The essential principle is that a State should not be able to do through another what it could not do itself.

³¹⁷ Ibid., p. 161. See also, in another context, *Drodz & Janousek v. France & Spain*, E.C.H.R., Series A, No. 240 (1992); see also *Iribarne Pérez v. France*, E.C.H.R., Series A, No. 325-C (1995), at pp. 62-63, paras. 29-31.

³¹⁸ It may be that the fact of the dependence of one State upon another is relevant in terms of the burden of proof, since the mere existence of a formal State apparatus does not exclude the possibility that control was exercised in fact by an occupying Power. Cf. *Restitution of Household Effects Belonging to Jews Deported from Hungary (Germany)* (Kammergericht, Berlin) (1965), I.L.R., vol. 44, p. 301, at pp. 340-342.

(9) As to the responsibility of the directed and controlled State, the mere fact that it was directed to carry out an internationally wrongful act does not constitute an excuse under chapter V of Part One. If the conduct in question would involve a breach of its international obligations, it is incumbent upon it to decline to comply with the direction. The defence of “superior orders” does not exist for States in international law. This is not to say that the wrongfulness of the directed and controlled State’s conduct may not be precluded under chapter V, but this will only be so if it can show the existence of a circumstance precluding wrongfulness, e.g. *force majeure*. In such a case it is to the directing State alone that the injured State must look. But as between States, genuine cases of *force majeure* or coercion are exceptional. Conversely it is no excuse for the directing State to show that the directed State was a willing or even enthusiastic participant in the internationally wrongful conduct, if in truth the conditions laid down in article 17 are met.

Article 18

Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(b) The coercing State does so with knowledge of the circumstances of the act.

Commentary

(1) The third case of derived responsibility dealt with by chapter IV is that of coercion of one State by another. Article 18 is concerned with the specific problem of coercion deliberately exercised in order to procure the breach of one State’s obligation to a third State. In such cases the responsibility of the coercing State with respect to the third State derives not from its act of coercion, but rather from the wrongful conduct resulting from the action of the coerced State. Responsibility for the coercion itself is that of the coercing State vis-à-vis the coerced State, whereas responsibility under article 18 is the responsibility of the coercing State vis-à-vis a victim of the coerced act, in particular a third State which is injured as a result.

(2) Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State. It is not sufficient that compliance with the obligation is made more difficult or onerous, or that the acting State is assisted or directed in its conduct: such questions are covered by the preceding articles. Moreover, the coercing State must coerce the very act which is internationally wrongful. It is not enough that the consequences of the coerced act merely make it more difficult for the coerced State to comply with the obligation.

(3) Though coercion for the purpose of article 18 is narrowly defined, it is not limited to unlawful coercion.³¹⁹ As a practical matter, most cases of coercion meeting the requirements of the article will be unlawful, e.g., because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention, i.e. coercive interference, in the affairs of another State. Such is also the case with countermeasures. They may have a coercive character, but as is made clear in article 49, their function is to induce a wrongdoing State to comply with obligations of cessation and reparation towards the State taking the countermeasures, not to coerce that State to violate obligations to third States.³²⁰ However, coercion could possibly take other forms, e.g. serious economic pressure, provided that it is such as to deprive the coerced State of any possibility of conforming with the obligation breached.

(4) The equation of coercion with *force majeure* means that in most cases where article 18 is applicable, the responsibility of the coerced State will be precluded vis-à-vis the injured third State. This is reflected in the phrase “but for the coercion” in subparagraph (a) of article 18. Coercion amounting to *force majeure* may be the reason why the wrongfulness of an act is precluded vis-à-vis the coerced State. Therefore the act is not described as an internationally wrongful act in the opening clause of the article, as is done in articles 16 and 17, where no comparable circumstance would preclude the wrongfulness of the act of the assisted or controlled State. But there is no reason why the wrongfulness of that act should be precluded vis-à-vis the coercing State. On the contrary, if the coercing State cannot be held responsible for the act in question, the injured State may have no redress at all.

³¹⁹ P. Reuter, *Introduction au droit des traités* (3rd edn.) (Paris, Presse Universitaire de France, 1995), pp. 159-161, paras. 271-274.

³²⁰ See article 49 (2) and commentary.

(5) It is a further requirement for responsibility under article 18 that the coercing State must be aware of the circumstances which would, but for the coercion, have entailed the wrongfulness of the coerced State's conduct. The reference to "circumstances" in subparagraph (b) is understood as reference to the factual situation rather than to the coercing State's judgement of the legality of the act. This point is clarified by the phrase "circumstances of the act". Hence, while ignorance of the law is no excuse, ignorance of the facts is material in determining the responsibility of the coercing State.

(6) A State which sets out to procure by coercion a breach of another State's obligations to a third State will be held responsible to the third State for the consequences, regardless of whether the coercing State is also bound by the obligation in question. Otherwise, the injured State would potentially be deprived of any redress, because the acting State may be able to rely on *force majeure* as a circumstance precluding wrongfulness. Article 18 thus differs from articles 16 and 17 in that it does not allow for an exemption from responsibility for the act of the coerced State in circumstances where the coercing State is not itself bound by the obligation in question.

(7) State practice lends support to the principle that a State bears responsibility for the internationally wrongful conduct of another State which it coerces. In the *Romano-Americana* case, the claim of the United States Government in respect of the destruction of certain oil storage and other facilities owned by an American company on the orders of the Romanian Government during the First World War was originally addressed to the British Government. At the time the facilities were destroyed, Romania was at war with Germany, which was preparing to invade the country, and the United States claimed that the Romanian authorities had been "compelled" by Great Britain to take the measures in question. In support of its claim, the United States Government argued that the circumstances of the case revealed "a situation where a strong belligerent for a purpose primarily its own arising from its defensive requirements at sea, compelled a weaker Ally to acquiesce in an operation which it carried out in the territory of that Ally."³²¹ The British Government denied responsibility, asserting that its influence over the

³²¹ Note from the United States Embassy in London, 16 February 1925, in Hackworth, *Digest*, vol. V, p. 702.

conduct of the Romanian authorities “did not in any way go beyond the limits of persuasion and good counsel as between governments associated in a common cause.”³²² The point of disagreement between the governments of the United States and of Great Britain was not as to the responsibility of a State for the conduct of another State which it has coerced, but rather the existence of “compulsion” in the particular circumstances of the case.³²³

Article 19

Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

Commentary

- (1) Article 19 serves three purposes. First, it preserves the responsibility of the State which has committed the internationally wrongful act, albeit with the aid or assistance, under the direction and control or subject to the coercion of another State. It recognizes that the attribution of international responsibility to an assisting, directing or coercing State does not preclude the responsibility of the assisted, directed or coerced State.
- (2) Second, the article makes clear that the provisions of chapter IV are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State under any rule of international law defining particular conduct as wrongful. The phrase “under other provisions of these articles” is a reference, *inter alia*, to article 23 (*force majeure*), which might affect the question of responsibility. The phrase also draws attention to the fact that other provisions of the draft articles may be relevant to the State committing the act in question, and that chapter IV in no way precludes the issue of its responsibility in that regard.
- (3) Third, article 19 preserves the responsibility “of any other State” to whom the internationally wrongful conduct might also be attributable under other provisions of the articles.

³²² Note from the British Foreign Office dated 5 July 1928, *ibid.*, p. 704.

³²³ For a different example involving the coercion of a breach of contract in circumstances amounting to a denial of justice see C.L. Bouvé, “Russia’s liability in tort for Persia’s breach of contract”, *A.J.I.L.*, vol. 6 (1912), p. 389.

(4) Thus article 19 is intended to avoid any contrary inference in respect of responsibility which may arise from primary rules, precluding certain forms of assistance or from acts otherwise attributable to any State under chapter II. The article covers both the implicated and the acting State. It makes it clear that chapter IV is concerned only with situations in which the act which lies at the origin of the wrong is an act committed by one State and not by the other. If both States commit the act, then that situation would fall within the realm of co-perpetrators, dealt with in chapter II.

Chapter V

Circumstances precluding wrongfulness

(1) Chapter V sets out six circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned. The existence in a given case of a circumstance precluding wrongfulness in accordance with this chapter provides a shield against an otherwise well-founded claim for the breach of an international obligation. The six circumstances are: consent (article 20), self-defence (article 21), countermeasures (article 22), *force majeure* (article 23), distress (article 24) and necessity (article 25). Article 26 makes it clear that none of these circumstances can be relied on if to do so would conflict with a peremptory norm of general international law. Article 27 deals with certain consequences of the invocation of one of these circumstances.

(2) Consistently with the approach of the present articles, the circumstances precluding wrongfulness set out in chapter V are of general application. Unless otherwise provided,³²⁴ they apply to any internationally wrongful act whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act or from any other source. They do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists. This was emphasized by the International Court in the *Gabčíkovo-Nagymaros Project* case. Hungary sought to argue that the wrongfulness of its conduct in discontinuing work on the Project in breach of its obligations under the 1977 Treaty was precluded by necessity. In dealing with the Hungarian plea, the Court said:

“The state of necessity claimed by Hungary - supposing it to have been established - thus could not permit of the conclusion that ... it had acted in accordance with its obligations

³²⁴ E.g., by a treaty to the contrary, which would constitute a *lex specialis* under article 55.

under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did.”³²⁵

Thus a distinction must be drawn between the effect of circumstances precluding wrongfulness and the termination of the obligation itself. The circumstances in chapter V operate as a shield rather than a sword. As Fitzmaurice noted, where one of the circumstances precluding wrongfulness applies, “the non-performance is not only justified, but ‘looks towards’ a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present ...”³²⁶

(3) This distinction emerges clearly from the decisions of international tribunals. In the *Rainbow Warrior* arbitration, the Tribunal held that both the law of treaties and the law of State responsibility had to be applied, the former to determine whether the treaty was still in force, the latter to determine what the consequences were of any breach of the treaty while it was in force, including the question whether the wrongfulness of the conduct in question was precluded.³²⁷ In the *Gabčíkovo-Nagymaros Project* case, the Court noted that:

“Even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but - unless the parties by mutual agreement terminate the treaty - it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.”³²⁸

³²⁵ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports 1997*, p. 7, at p. 39, para. 48.

³²⁶ Fitzmaurice, “Fourth Report on the Law of Treaties”, *Yearbook ... 1959*, vol. II, p. 41.

³²⁷ *Rainbow Warrior (New Zealand/France)*, *UNRIIAA*, vol. XX, p. 217 (1990), at pp. 251-252, para. 75.

³²⁸ *I.C.J. Reports 1997*, p. 7, at p. 63, para. 101; see also p. 38, para. 47.

(4) While the same facts may amount, for example, to *force majeure* under article 23 and to a supervening impossibility of performance under article 61 of the Vienna Convention on the Law of Treaties,³²⁹ the two are distinct. *Force majeure* justifies non-performance of the obligation for so long as the circumstance exists; supervening impossibility justifies the termination of the treaty or its suspension in accordance with the conditions laid down in article 61. The former operates in respect of the particular obligation, the latter with respect to the treaty which is the source of that obligation. Just as the scope of application of the two doctrines is different, so is their mode of application. *Force majeure* excuses non-performance for the time being, but a treaty is not automatically terminated by supervening impossibility: at least one of the parties must decide to terminate it.

(5) The concept of circumstances precluding wrongfulness may be traced to the work of the Preparatory Committee of the 1930 Hague Conference. Among its Bases of Discussion,³³⁰ it listed two “Circumstances under which States can decline their responsibility”, self-defence and reprisals.³³¹ It considered that the extent of a State’s responsibility in the context of diplomatic protection could also be affected by the “provocative attitude” adopted by the injured person (Basis of Discussion No. 19) and that a State could not be held responsible for damage caused by its armed forces “in the suppression of an insurrection, riot or other disturbance” (Basis of Discussion No. 21). However, these issues were not taken to any conclusion.

(6) The category of circumstances precluding wrongfulness was developed by the International Law Commission in its work on international responsibility for injuries to aliens³³²

³²⁹ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

³³⁰ *Yearbook ... 1956*, vol. II, pp. 223-225.

³³¹ *Ibid.*, pp. 224-225. Issues raised by the Calvo clause and the exhaustion of local remedies were dealt with under the same heading.

³³² *Yearbook ... 1958*, vol. II, p. 72. For the discussion of the circumstances by García Amador, see his “First Report on State responsibility”, *Yearbook ... 1956*, vol. II, pp. 203-209 and his “Third Report on State responsibility”, *Yearbook ... 1958*, vol. II, pp. 50-55.

and the performance of treaties.³³³ In the event the subject of excuses for the non-performance of treaties was not included within the scope of the Vienna Convention on the Law of Treaties.³³⁴ It is a matter for the law on State responsibility.

(7) Circumstances precluding wrongfulness are to be distinguished from other arguments which may have the effect of allowing a State to avoid responsibility. They have nothing to do with questions of the jurisdiction of a court or tribunal over a dispute or the admissibility of a claim. They are to be distinguished from the constituent requirements of the obligation, i.e., those elements which have to exist for the issue of wrongfulness to arise in the first place and which are in principle specified by the obligation itself. In this sense the circumstances precluding wrongfulness operate like defences or excuses in internal legal systems, and the circumstances identified in chapter V are recognized by many legal systems, often under the same designation.³³⁵ On the other hand, there is no common approach to these circumstances in internal law, and the conditions and limitations in chapter V have been developed independently.

(8) Just as the Articles do not deal with questions of the jurisdiction of courts or tribunals, so they do not deal with issues of evidence or the burden of proof. In a bilateral dispute over State responsibility, the onus of establishing responsibility lies in principle on the claimant State. Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance under chapter V, however, the position changes and the onus lies on that State to justify or excuse its conduct. Indeed, it is often the case that only that State is fully aware of the facts which might excuse its non-performance.

(9) Chapter V sets out the circumstances precluding wrongfulness presently recognized under general international law.³³⁶ Certain other candidates have been excluded. For example,

³³³ Fitzmaurice, "Fourth Report on the Law of Treaties", *Yearbook ... 1959*, vol. II, pp. 44-47, and for his commentary, *ibid.*, pp. 63-74.

³³⁴ See article 73 of the Vienna Convention on the Law of Treaties.

³³⁵ See the comparative review by C. von Bar, *The Common European Law of Torts*, vol. 2 (Munich, Beck, 2000), pp. 499-592.

³³⁶ For the effect of contribution to the injury by the injured State or other person or entity see article 39 and commentary. This does not preclude wrongfulness but is relevant in determining the extent and form of reparation.

the exception of non-performance (*exceptio inadimpleti contractus*) is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness.³³⁷ The principle that a State may not benefit from its own wrongful act is capable of generating consequences in the field of State responsibility but it is rather a general principle than a specific circumstance precluding wrongfulness.³³⁸ The so-called “clean hands” doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied. It also does not need to be included here.³³⁹

Article 20

Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Commentary

(1) Article 20 reflects the basic international law principle of consent in the particular context of Part I. In accordance with this principle, consent by a State to particular conduct by another State precludes the wrongfulness of that act in relation to the consenting State, provided the consent is valid and to the extent that the conduct remains within the limits of the consent given.

³³⁷ Compare *Diversion of Water from the Meuse (Netherlands v. Belgium)*, 1937, P.C.I.J., Series A/B, No. 70, p. 4, esp. at pp. 50, 77. See further Fitzmaurice, “Fourth Report on the Law of Treaties”, *Yearbook...* 1959, vol. II, pp. 43-47; D.W. Greig, “Reciprocity, Proportionality and the Law of Treaties”, *Virginia Journal of International Law*, vol. 34 (1994), p. 295; and for a comparative review, G.H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford, Clarendon Press, 1987), pp. 245-317. For the relationship between the exception of non-performance and countermeasures see below, commentary to Part Three, chapter II, para. (5).

³³⁸ See e.g. *Factory at Chorzów, Jurisdiction*, 1927, P.C.I.J., Series A, No. 9, p. 31; cf. *Gabčíkovo-Nagymaros Project*, I.C.J. Reports 1997, p. 7, at p. 67, para. 110.

³³⁹ See J.J.A. Salmon, “Des ‘mains propres’ comme condition de recevabilité des réclamations internationales”, *A.F.D.I.*, vol. 10 (1964), p. 225; A. Miaja de la Muela, “Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux”, in *Mélanges offerts à Juraj Andrassy* (The Hague, Martinus Nijhoff, 1968), p. 189, and the dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, I.C.J. Reports 1986, p. 14, at pp. 392-394.

(2) It is a daily occurrence that States consent to conduct of other States which, without such consent, would constitute a breach of an international obligation. Simple examples include transit through the airspace or internal waters of a State, the location of facilities on its territory or the conduct of official investigations or inquiries there. But a distinction must be drawn between consent in relation to a particular situation or a particular course of conduct, and consent in relation to the underlying obligation itself. In the case of a bilateral treaty the States parties can at any time agree to terminate or suspend the treaty, in which case obligations arising from the treaty will be terminated or suspended accordingly.³⁴⁰ But quite apart from that possibility, States have the right to dispense with the performance of an obligation owed to them individually, or generally to permit conduct to occur which (absent such permission) would be unlawful so far as they are concerned. In such cases, the primary obligation continues to govern the relations between the two States, but it is displaced on the particular occasion or for the purposes of the particular conduct by reason of the consent given.

(3) Consent to the commission of otherwise wrongful conduct may be given by a State in advance or even at the time it is occurring. By contrast cases of consent given after the conduct has occurred are a form of waiver or acquiescence, leading to loss of the right to invoke responsibility. This is dealt with in article 45.

(4) In order to preclude wrongfulness, consent dispensing with the performance of an obligation in a particular case must be “valid”. Whether consent has been validly given is a matter addressed by international law rules outside the framework of State responsibility. Issues include whether the agent or person who gave the consent was authorized to do so on behalf of the State (and if not, whether the lack of that authority was known or ought to have been known to the acting State), or whether the consent was vitiated by coercion or some other factor.³⁴¹ Indeed there may be a question whether the State could validly consent at all. The reference to a “valid consent” in article 20 highlights the need to consider these issues in certain cases.

³⁴⁰ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 54 (b).

³⁴¹ See, e.g., the issue of Austrian consent to the *Anschluss* of 1938, dealt with by the Nürnberg Tribunal. The Tribunal denied that Austrian consent had been given; even if it had, it would have been coerced and did not excuse the annexation. See International Military Tribunal for the Trial of German Major War Criminals, judgment of 1 October 1946, reprinted in *A.J.I.L.*, vol. 41 (1947) p. 172, at pp. 192-194.

(5) Whether a particular person or entity had the authority to grant consent in a given case is a separate question from whether the conduct of that person or entity was attributable to the State for the purposes of chapter II. For example, the issue has arisen whether consent expressed by a regional authority could legitimize the sending of foreign troops into the territory of a State, or whether such consent could only be given by the central government, and such questions are not resolved by saying that the acts of the regional authority are attributable to the State under article 4.³⁴² In other cases, the “legitimacy” of the government which has given the consent has been questioned. Sometimes the validity of consent has been questioned because the consent was expressed in violation of relevant provisions of the State’s internal law. These questions depend on the rules of international law relating to the expression of the will of the State, as well as rules of internal law to which, in certain cases, international law refers.

(6) Who has authority to consent to a departure from a particular rule may depend on the rule. It is one thing to consent to a search of embassy premises, another to the establishment of a military base on the territory of a State. Different officials or agencies may have authority in different contexts, in accordance with the arrangements made by each State and general principles of actual and ostensible authority. But in any case, certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion. In this respect, the principles concerning the validity of consent to treaties provide relevant guidance.

(7) Apart from drawing attention to prerequisites to a valid consent, including issues of the authority to consent, the requirement for consent to be valid serves a further function. It points to the existence of cases in which consent may not be validly given at all. This question is discussed in relation to article 26 (compliance with peremptory norms), which applies to Part V as a whole.³⁴³

³⁴² This issue arose with respect to the dispatch of Belgian troops to the Republic of Congo in 1960. See *S.C.O.R., Fifteenth Year*, 873rd meeting, 13-14 July 1960, particularly the statement of the representative of Belgium, paras. 186-188, 209.

³⁴³ See commentary to article 26, para. (6).

(8) Examples of consent given by a State which has the effect of rendering certain conduct lawful include commissions of inquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, humanitarian relief and rescue operations and the arrest or detention of persons on foreign territory. In the *Savarkar* case, the arbitral tribunal considered that the arrest of Savarkar was not a violation of French sovereignty as France had implicitly consented to the arrest through the conduct of its gendarme, who aided the British authorities in the arrest.³⁴⁴ In considering the application of article 20 to such cases it may be necessary to have regard to the relevant primary rule. For example, only the head of a diplomatic mission can consent to the receiving State's entering the premises of the mission.³⁴⁵

(9) Article 20 is concerned with the relations between the two States in question. In circumstances where the consent of a number of States is required, the consent of one State will not preclude wrongfulness in relation to another.³⁴⁶ Furthermore, where consent is relied on to preclude wrongfulness, it will be necessary to show that the conduct fell within the limits of the consent. Consents to overflight by commercial aircraft of another State would not preclude the wrongfulness of overflight by aircraft transporting troops and military equipment. Consent to the stationing of foreign troops for a specific period would not preclude the wrongfulness of the stationing of such troops beyond that period.³⁴⁷ These limitations are indicated by the words "given act" in article 20 as well as by the phrase "within the limits of that consent".

³⁴⁴ *UNRIIAA.*, vol. XI, p. 243 (1911), at pp. 252-255.

³⁴⁵ Vienna Convention on Diplomatic Relations, United Nations, *Treaty Series*, vol. 500, p. 95, art. 22 (1).

³⁴⁶ Austrian consent to the proposed customs union of 1931 would not have precluded its wrongfulness in regard of the obligation to respect Austrian independence owed by Germany to all the Parties to the Treaty of Versailles. Likewise, Germany's consent would not have precluded the wrongfulness of the customs union in respect of the obligation of the maintenance of its complete independence imposed on Austria by the Treaty of St. Germain. See *Customs Regime between Germany and Austria, 1931, P.C.I.J., Series A/B, No. 41*, p. 37, at pp. 46, 49.

³⁴⁷ The non-observance of a condition placed on the consent will not necessarily take conduct outside of the limits of the consent. For example, consent to a visiting force on the territory of a State may be subject to a requirement to pay rent for the use of facilities. While the non-payment of the rent would no doubt be a wrongful act, it would not transform the visiting force into an army of occupation.

(10) Article 20 envisages only the consent of States to conduct otherwise in breach of an international obligation. International law may also take into account the consent of non-State entities such as corporations or private persons. The extent to which investors can waive the rules of diplomatic protection by agreement in advance has long been controversial, but under the Washington Convention of 1965, consent by an investor to arbitration under the Convention has the effect of suspending the right of diplomatic protection by the investor's national State.³⁴⁸ The rights conferred by international human rights treaties cannot be waived by their beneficiaries, but the individual's free consent may be relevant to their application.³⁴⁹ In these cases the particular rule of international law itself allows for the consent in question and deals with its effect. By contrast article 20 states a general principle so far as enjoyment of the rights and performance of the obligations of States are concerned.

Article 21

Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Commentary

(1) The existence of a general principle admitting self-defence as an exception to the prohibition against the use of force in international relations is undisputed. Article 51 of the Charter of the United Nations preserves a State's "inherent right" of self-defence in the face of an armed attack and forms part of the definition of the obligation to refrain from the threat or use of force laid down in Article 2, paragraph (4). Thus a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph (4).³⁵⁰

³⁴⁸ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, United Nations, *Treaty Series*, vol. 575, p. 159, art. 27 (1).

³⁴⁹ See, e.g., International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, p. 171, arts. 7; 8 (3); 14 (1) (g); 23 (3).

³⁵⁰ Cf. *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, p. 226, at p. 244, para. 38; p. 263, para. 96, emphasizing the lawfulness of the use of force in self-defence.

(2) Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph (4), of the Charter, provided that such non-performance is related to the breach of that provision. Traditional international law dealt with these problems by instituting a separate legal regime of war, defining the scope of belligerent rights and suspending most treaties in force between the belligerents on the outbreak of war.³⁵¹ In the Charter period, declarations of war are exceptional and military actions proclaimed as self-defence by one or both parties occur between States formally at “peace” with each other.³⁵² The Vienna Convention on the Law of Treaties leaves such issues to one side by providing in article 73 that the Convention does not prejudice “any question that may arise in regard to a treaty ... from the outbreak of hostilities between States”.

(3) This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions of 1949 and Protocol I of 1977 apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law.³⁵³ Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self-defence. As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.

³⁵¹ See further A. McNair & A. D. Watts, *Legal Effects of War* (4th edn.) (Cambridge, Cambridge University Press, 1966), p. 579.

³⁵² In *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection*, *I.C.J. Reports 1996*, p. 803, it was not denied that the Treaty of Amity of 1955 remained in force, despite many actions by United States naval forces against Iran. In that case both parties agreed that to the extent that any such actions were justified by self-defence they would be lawful.

³⁵³ As the Court said of the rules of international humanitarian law in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, p. 226, at p. 257, para. 79, they constitute “intransgressible principles of international customary law”. On the relationship between human rights and humanitarian law in time of armed conflict, see *ibid.*, p. 240, para. 25.

(4) The International Court in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* provided some guidance on this question. One issue before the Court was whether a use of nuclear weapons would necessarily be a breach of environmental obligations because of the massive and long-term damage such weapons can cause. The Court said:

“[T]he issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict. The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.”³⁵⁴

A State acting in self-defence is “totally restrained” by an international obligation if that obligation is expressed or intended to apply as a definitive constraint even to States in armed conflict.³⁵⁵

(5) The essential effect of article 21 is to preclude the wrongfulness of conduct of a State acting in self-defence vis-à-vis an attacking State. But there may be effects vis-à-vis third States in certain circumstances. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court observed that:

“[A]s in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons may be used.”³⁵⁶

³⁵⁴ *I.C.J. Reports 1996*, p. 226, at p. 242, para. 30.

³⁵⁵ See, e.g., Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, United Nations, *Treaty Series*, vol. 1108, p. 151.

³⁵⁶ *I.C.J. Reports 1996*, p. 226, at p. 261, para. 89.

The law of neutrality distinguishes between conduct as against a belligerent and conduct as against a neutral. But neutral States are not unaffected by the existence of a state of war.

Article 21 leaves open all issues of the effect of action in self-defence vis-à-vis third States.

(6) Thus article 21 reflects the generally accepted position that self-defence precludes the wrongfulness of the conduct taken within the limits laid down by international law. The reference is to action “taken in conformity with the Charter of the United Nations”. In addition, the term “lawful” implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter.

Article 22

Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.

Commentary

(1) In certain circumstances, the commission by one State of an internationally wrongful act may justify another State injured by that act in taking non-forcible countermeasures in order to procure its cessation and to achieve reparation for the injury. Article 22 deals with this situation from the perspective of circumstances precluding wrongfulness. Chapter II of Part Three regulates countermeasures in further detail.

(2) Judicial decisions, State practice and doctrine confirm the proposition that countermeasures meeting certain substantive and procedural conditions may be legitimate. In the *Gabčíkovo-Nagymaros Project* case, the International Court clearly accepted that countermeasures might justify otherwise unlawful conduct “taken in response to a previous international wrongful act of another State and ... directed against that State”,³⁵⁷ provided certain

³⁵⁷ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, at p. 55, para. 83.

conditions are met. Similar recognition of the legitimacy of measures of this kind in certain cases can be found in arbitral decisions, in particular the *Naulilaa*,³⁵⁸ *Cysne*,³⁵⁹ and *Air Services*³⁶⁰ awards.

(3) In the literature concerning countermeasures, reference is sometimes made to the application of a “sanction”, or to a “reaction” to a prior internationally wrongful act; historically the more usual terminology was that of “legitimate reprisals” or, more generally, measures of “self-protection” or “self-help”. The term “sanctions” has been used for measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the United Nations Charter - despite the fact that the Charter uses the term “measures”, not “sanctions”. The term “reprisals” is now no longer widely used in the present context, because of its association with the law of belligerent reprisals involving the use of force. At least since the *Air Services* arbitration,³⁶¹ the term “countermeasures” has been preferred, and it has been adopted for the purposes of the present Articles.

(4) Where countermeasures are taken in accordance with article 22, the underlying obligation is not suspended, still less terminated; the wrongfulness of the conduct in question is precluded for the time being by reason of its character as a countermeasure, but only provided that and for so long as the necessary conditions for taking countermeasures are satisfied. These conditions are set out in Part Three, chapter II, to which article 22 refers. As a response to internationally wrongful conduct of another State countermeasures may be justified only in relation to that State. This is emphasized by the phrases “if and to the extent” and “countermeasures taken against” the responsible State. An act directed against a third State would not fit this definition and could not be justified as a countermeasure. On the other hand, indirect or consequential effects of countermeasures on third parties, which do not involve an independent breach of any obligation to those third parties, will not take a countermeasure outside the scope of article 22.

³⁵⁸ “*Naulilaa*” (*Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa*), *UNRIAA*, vol. II, p. 1011 (1928), at pp. 1025-1026.

³⁵⁹ “*Cysne*” (*Responsibility of Germany for acts committed subsequent to 31 July 1914 and before Portugal entered into the war*), *UNRIAA*, vol. II, p. 1035 (1930), at p. 1052.

³⁶⁰ *Air Services Agreement of 27 March 1946 (United States v. France)*, *UNRIAA*, vol. XVIII, p. 416 (1979).

³⁶¹ *Ibid.*, vol. XVIII, p. 416 (1979), especially at pp. 443-446, paras. 80-98.

(5) Countermeasures may only preclude wrongfulness in the relations between an injured State and the State which has committed the internationally wrongful act. The principle is clearly expressed in the *Cysne* case, where the Tribunal stressed that ...

“reprisals, which constitute an act in principle contrary to the law of nations, are defensible only in so far as they were *provoked* by some other act likewise contrary to that law. *Only reprisals taken against the provoking State are permissible*. Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavour to avoid or to limit as far as possible.”³⁶²

Accordingly the wrongfulness of Germany’s conduct vis-à-vis Portugal was not precluded. Since it involved the use of armed force, this decision concerned belligerent reprisals rather than countermeasures in the sense of article 22. But the same principle applies to countermeasures, as the Court confirmed in the *Gabčíkovo-Nagymaros Project* case when it stressed that the measure in question must be “directed against” the responsible State.³⁶³

(6) If article 22 had stood alone, it would have been necessary to spell out other conditions for the legitimacy of countermeasures, including in particular the requirement of proportionality, the temporary or reversible character of countermeasures and the status of certain fundamental obligations which may not be subject to countermeasures. Since these conditions are dealt with in Part Three, chapter II, it is sufficient to make a cross-reference to them here. Article 22 covers any action which qualifies as a countermeasure in accordance with those conditions. One issue is whether countermeasures may be taken by third States which are not themselves individually injured by the internationally wrongful act in question, although they are owed the obligation which has been breached.³⁶⁴ For example, in the case of an obligation owed to the international community as a whole the International Court has affirmed that all States have a legal interest in

³⁶² Ibid., vol. II, p. 1035 (1930), at pp. 1056-1057 (emphasis in original).

³⁶³ *I.C.J. Reports 1997*, p. 7, at p. 55, para. 83.

³⁶⁴ For the distinction between injured States and other States entitled to invoke State responsibility see articles 42 and 48 and commentaries.

compliance.³⁶⁵ Article 54 leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State. While article 22 does not cover measures taken in such a case to the extent that these do not qualify as countermeasures, neither does it exclude that possibility.

Article 23

Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
2. Paragraph 1 does not apply if:
 - (a) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - (b) The State has assumed the risk of that situation occurring.

Commentary

- (1) *Force majeure* is quite often invoked as a ground for precluding the wrongfulness of an act of a State.³⁶⁶ It involves a situation where the State in question is in effect compelled to act in a manner not in conformity with the requirements of an international obligation incumbent upon it. *Force majeure* differs from a situation of distress (article 24) or necessity (article 25) because the conduct of the State which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice.
- (2) A situation of *force majeure* precluding wrongfulness only arises where three elements are met: (a) the act in question must be brought about by an irresistible force or an unforeseen event, (b) which is beyond the control of the State concerned, and (c) which makes it materially impossible in the circumstances to perform the obligation. The adjective “irresistible” qualifying

³⁶⁵ *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33.

³⁶⁶ See *Secretariat Survey*, “‘Force majeure’ and ‘fortuitous event’ as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine”, *Yearbook ... 1978*, vol. II, Part One, p. 61.

the word “force” emphasizes that there must be a constraint which the State was unable to avoid or oppose by its own means. To have been “unforeseen” the event must have been neither foreseen nor of an easily foreseeable kind. Further the “irresistible force” or “unforeseen event” must be causally linked to the situation of material impossibility, as indicated by the words “due to *force majeure* ... making it materially impossible”. Subject to paragraph 2, where these elements are met the wrongfulness of the State’s conduct is precluded for so long as the situation of *force majeure* subsists.

(3) Material impossibility of performance giving rise to *force majeure* may be due to a natural or physical event (e.g., stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or to human intervention (e.g., loss of control over a portion of the State’s territory as a result of an insurrection or devastation of an area by military operations carried out by a third State), or some combination of the two. Certain situations of duress or coercion involving force imposed on the State may also amount to *force majeure* if they meet the various requirements of article 23. In particular the situation must be irresistible, so that the State concerned has no real possibility of escaping its effects. *Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis. Nor does it cover situations brought about by the neglect or default of the State concerned,³⁶⁷ even if the resulting injury itself was accidental and unintended.³⁶⁸

³⁶⁷ E.g., in relation to occurrences such as the bombing of La-Chaux-de-Fonds by German airmen on 17 October 1915, and of Porrentruy by a French airman on 26 April 1917, ascribed to negligence on the part of the airmen, the belligerent undertook to punish the offenders and make reparation for the damage suffered: *Secretariat Survey*, paras. 255-256.

³⁶⁸ E.g., in 1906 an American officer on the U.S.S. *Chattanooga* was mortally wounded by a bullet from a French warship as his ship entered the Chinese harbour of Chefoo. The United States Government obtained reparation, having maintained that:

“While the killing of Lieutenant England can only be viewed as an accident, it cannot be regarded as belonging to the unavoidable class whereby no responsibility is entailed. Indeed, it is not conceivable how it could have occurred without the contributory element of lack of proper precaution on the part of those officers of the *Dupetit Thouars* who were in responsible charge of the rifle firing practice and who failed to stop firing when the *Chattanooga*, in the course of her regular passage through the public channel, came into the line of fire.”

Whiteman, *Damages*, vol. I, p. 221. See also *Secretariat Survey*, para. 130.

(4) In drafting what became article 61 of the Vienna Convention on the Law of Treaties, the International Law Commission took the view that *force majeure* was a circumstance precluding wrongfulness in relation to treaty performance, just as supervening impossibility of performance was a ground for termination of a treaty.³⁶⁹ The same view was taken at the Vienna Conference.³⁷⁰ But in the interests of the stability of treaties, the Conference insisted on a narrow formulation of article 61 so far as treaty termination is concerned. The degree of difficulty associated with *force majeure* as a circumstance precluding wrongfulness, though considerable, is less than is required by article 61 for termination of a treaty on grounds of supervening impossibility, as the International Court pointed out in the *Gabčíkovo-Nagymaros Project* case:

“Article 61, paragraph 1, requires the ‘permanent disappearance or destruction of an object indispensable for the execution’ of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties... Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.”³⁷¹

(5) In practice, many of the cases where “impossibility” has been relied upon have not involved actual impossibility as distinct from increased difficulty of performance and the plea of *force majeure* has accordingly failed. But cases of material impossibility have occurred,

³⁶⁹ *Yearbook ... 1966*, vol. II, p. 255.

³⁷⁰ See, e.g., the proposal of the Mexican representative, *Official Records of the United Nations Conference on the Law of Treaties Documents of the Conference*, pp. 182-189, A/CONF.39/14, para. 531 (a).

³⁷¹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports 1997*, p. 7, at p. 63, para. 102.

e.g. where a State aircraft is forced, due to damage or loss of control of the aircraft due to weather, into the airspace of another State without the latter's authorization. In such cases the principle that wrongfulness is precluded has been accepted.³⁷²

(6) Apart from aerial incidents, the principle in article 23 is also recognized in relation to ships in innocent passage by article 14 (3) of the 1958 Convention on the Territorial Sea and the Contiguous Zone³⁷³ (article 18 (2) of the 1982 United Nations Convention on the Law of the Sea³⁷⁴), as well as in article 7 (1) of the Convention on Transit Trade of Land-locked States of 8 July 1965.³⁷⁵ In these provisions, *force majeure* is incorporated as a constituent element of the relevant primary rule; nonetheless its acceptance in these cases helps to confirm the existence of a general principle of international law to similar effect.

(7) The principle has also been accepted by international tribunals. Mixed claims commissions have frequently cited the unforeseeability of attacks by rebels in denying the responsibility of the territorial State for resulting damage suffered by foreigners.³⁷⁶ In the *Lighthouses* arbitration, a lighthouse owned by a French company had been requisitioned by the

³⁷² See, e.g., the cases of accidental intrusion into airspace attributable to weather, and the cases of accidental bombing of neutral territory attributable to navigational errors during the First World War discussed in the *Secretariat Survey*, paras. 250-256. See also the exchanges of correspondence between the States concerned in the incidents involving United States military aircraft entering the airspace of Yugoslavia in 1946: United States of America, *Department of State Bulletin*, vol. XV, No. 376 (15 September 1946), p. 502, reproduced in *Secretariat Survey*, para. 144, and the incident provoking the application to the International Court in 1954: *I.C.J. Pleadings, Treatment in Hungary of Aircraft and Crew of the United States of America*, p. 14 (note to the Hungarian Government of 17 March 1953). It is not always clear whether these cases are based on distress or *force majeure*.

³⁷³ United Nations, *Treaty Series*, vol. 516, p. 205.

³⁷⁴ United Nations, *Treaty Series*, vol. 1833, p. 397.

³⁷⁵ United Nations, *Treaty Series*, vol. 597, p. 42.

³⁷⁶ See, e.g., the decision of the American-British Claims Commission in the *Saint Albans Raid* case (1873), Moore, *International Arbitrations*, vol. IV, p. 4042; *Secretariat Survey*, para. 339; the decisions of the United States/Venezuelan Claims Commission in the *Wipperman* case, Moore, *International Arbitrations*, vol. III, p. 3039; *Secretariat Survey*, paras. 349-350; *De Brissot and others* cases, Moore, *International Arbitrations*, vol. III, p. 2967; *Secretariat Survey*, para. 352; and the decision of the British Mexican Claims Commission in the *Gill* case: *UNRIAA*, vol. V, p. 157 (1931); *Secretariat Survey*, para. 463.

Greek Government in 1915 and was subsequently destroyed by enemy action. The arbitral tribunal denied the French claim for restoration of the lighthouse on grounds of *force majeure*.³⁷⁷ In the *Russian Indemnity* case, the principle was accepted but the plea of *force majeure* failed because the payment of the debt was not materially impossible.³⁷⁸ *Force majeure* was acknowledged as a general principle of law (though again the plea was rejected on the facts of the case) by the Permanent Court of International Justice in the *Serbian Loans* and *Brazilian Loans* cases.³⁷⁹ More recently, in the *Rainbow Warrior* arbitration, France relied on *force majeure* as a circumstance precluding the wrongfulness of its conduct in removing the officers from Hao and not returning them following medical treatment. The Tribunal dealt with the point briefly:

“New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*.”³⁸⁰

(8) In addition to its application in inter-State cases as a matter of public international law, *force majeure* has substantial currency in the field of international commercial arbitration, and may qualify as a general principle of law.³⁸¹

³⁷⁷ *Ottoman Empire Lighthouses Concession*, UNRIAA, vol. XII, p. 155 (1956), at pp. 219-220.

³⁷⁸ *Ibid.*, vol. XI, p. 421 (1912), at p. 443.

³⁷⁹ *Serbian Loans*, 1929, P.C.I.J., Series A, No. 20, at pp. 33-40; *Brazilian Loans*, 1929, P.C.I.J., Series A, No. 21, at p. 120.

³⁸⁰ *Rainbow Warrior (New Zealand/France)*, UNRIAA, vol. XX, p. 217 (1990), at p. 253.

³⁸¹ On *force majeure* in the case law of the Iran-United States Claims Tribunal, see G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), pp. 306-320. *Force majeure* has also been recognized as a general principle of law by the European Court of Justice: see, e.g., Case 145/85, *Denkavit Belgie NV v. Belgium*, [1987] E.C.R. 565; Case 101/84, *Commission v. Italy*, [1985] E.C.R. 2629. See also art. 79 of the UNCITRAL Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, U.N.T.S., vol. 1489, p. 58; P. Schlechtriem & G. Thomas, *Commentary on the United Nations Convention on the International Sale of Goods* (2nd edn.) (Oxford, Clarendon Press, 1998), pp. 600-626; and art. 7.1.7 of the UNIDROIT Principles of International Commercial Contracts, in UNIDROIT, *Principles of International Commercial Contracts* (Rome, 1994), pp. 169-171.

(9) A State may not invoke *force majeure* if it has caused or induced the situation in question. In *Libyan Arab Foreign Investment Company v. Republic of Burundi*,³⁸² the Arbitral Tribunal rejected a plea of *force majeure* because “the alleged impossibility [was] not the result of an irresistible force or an unforeseen external event beyond the control of Burundi. In fact, the impossibility is the result of a unilateral decision of that State ...”³⁸³ Under the equivalent ground for termination of a treaty in article 61 of the Vienna Convention on the Law of Treaties, material impossibility cannot be invoked “if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty”. By analogy with this provision, subparagraph (2) (a) excludes the plea in circumstances where *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it. For subparagraph 2 (a) to apply it is not enough that the State invoking *force majeure* has contributed to the situation of material impossibility; the situation of *force majeure* must be “due” to the conduct of the State invoking it. This allows for *force majeure* to be invoked in situations in which a State may have unwittingly contributed to the occurrence of material impossibility by something which, in hindsight, might have been done differently but which was done in good faith and did not itself make the event any less unforeseen. Subparagraph 2 (a) requires that the State’s role in the occurrence of *force majeure* must be substantial.

(10) Subparagraph 2 (b) deals with situations in which the State has already accepted the risk of the occurrence of *force majeure*, whether it has done so in terms of the obligation itself or by its conduct or by virtue of some unilateral act. This reflects the principle that *force majeure* should not excuse performance if the State has undertaken to prevent the particular situation arising or has otherwise assumed that risk.³⁸⁴ Once a State accepts the responsibility for a particular risk it cannot then claim *force majeure* to avoid responsibility. But the assumption of risk must be unequivocal and directed towards those to whom the obligation is owed.

³⁸² *I.L.R.*, vol. 96 (1994), p. 279.

³⁸³ *Ibid.* at p. 318, para. 55.

³⁸⁴ As the *Secretariat Survey*, para. 31 points out, States may renounce the right to rely on *force majeure* by agreement. The most common way of doing so would be by an agreement or obligation assuming in advance the risk of the particular *force majeure* event.

Article 24

Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.
2. Paragraph 1 does not apply if:
 - (a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - (b) The act in question is likely to create a comparable or greater peril.

Commentary

(1) Article 24 deals with the specific case where an individual whose acts are attributable to the State is in a situation of peril, either personally or in relation to persons under his or her care. The article precludes the wrongfulness of conduct adopted by the State agent in circumstances where the agent had no other reasonable way of saving life. Unlike situations of *force majeure* dealt with in article 23, a person acting under distress is not acting involuntarily, even though the choice is effectively nullified by the situation of peril.³⁸⁵ Nor is it a case of choosing between compliance with international law and other legitimate interests of the State, such as characterize situations of necessity under article 25. The interest concerned is the immediate one of saving people's lives, irrespective of their nationality.

(2) In practice, cases of distress have mostly involved aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure.³⁸⁶ An example is the entry of United States military aircraft into Yugoslavia's airspace in 1946. On two occasions, United States military aircraft entered Yugoslav airspace without authorization and were attacked by Yugoslav air defences. The United States Government protested the Yugoslav

³⁸⁵ For this reason, writers who have considered this situation have often defined it as one of "relative impossibility" of complying with the international obligation. See, e.g., O.J. Lissitzyn, "The Treatment of Aerial Intruders in Recent Practice and International Law", *A.J.I.L.*, vol. 47 (1953), p. 588.

³⁸⁶ See *Secretariat Survey*, "'Force majeure' and 'fortuitous event' as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine", *Yearbook ... 1978*, vol. II, Part One, p. 61, paras. 141-142, 252.

action on the basis that the aircraft had entered Yugoslav airspace solely in order to escape extreme danger. The Yugoslav Government responded by denouncing the systematic violation of its airspace, which it claimed could only be intentional in view of its frequency. A later note from the Yugoslav Chargé d’Affaires informed the American Department of State that Marshal Tito had forbidden any firing on aircraft which flew over Yugoslav territory without authorization, presuming that, for its part, the United States Government “would undertake the steps necessary to prevent these flights, except in the case of emergency or bad weather, for which arrangements could be made by agreement between American and Yugoslav authorities”.³⁸⁷ The reply of the American Acting Secretary of State reiterated the assertion that no American planes had flown over Yugoslavia intentionally without prior authorization from Yugoslav authorities “unless forced to do so in an emergency”. However, the Acting Secretary of State added:

“I presume that the Government of Yugoslavia recognizes that in case a plane and its occupants are jeopardized, the aircraft may change its course so as to seek safety even though such action may result in flying over Yugoslav territory without prior clearance.”³⁸⁸

(3) Claims of distress have also been made in cases of violation of maritime boundaries. For example, in December 1975, after British naval vessels entered Icelandic territorial waters, the United Kingdom Government claimed that the vessels in question had done so in search of “shelter from severe weather, as they have the right to do under customary international law”.³⁸⁹ Iceland maintained that British vessels were in its waters for the sole purpose of provoking an incident, but did not contest the point that if the British vessels had been in a situation of distress, they could enter Icelandic territorial waters.

³⁸⁷ United States, *Department of State Bulletin*, vol. XV (15 September 1946), p. 502, reproduced in *Secretariat Survey*, para. 144.

³⁸⁸ *Secretariat Survey*, para. 145. The same argument is found in the Memorial of 2 December 1958 submitted by the United States Government to the International Court of Justice in relation to another aerial incident: see *I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 358-359.

³⁸⁹ *S.C.O.R., Thirtieth Year*, 1866th meeting., 16 December 1975; *Secretariat Survey*, para. 136.

(4) Although historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases.³⁹⁰ The *Rainbow Warrior* arbitration involved a plea of distress as a circumstance precluding wrongfulness outside the context of ships or aircraft. France sought to justify its conduct in removing the two officers from the island of Hao on the ground of “circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State”.³⁹¹ The Tribunal unanimously accepted that this plea was admissible in principle, and by majority that it was applicable to the facts of one of the two cases. As to the principle, the Tribunal required France to show three things:

- “(1) The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated.
- (2) The re-establishment of the original situation of compliance with the assignment in Hao as soon as the reasons of emergency invoked to justify the repatriation had disappeared.
- (3) The existence of a good-faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement.”³⁹²

In fact the danger to one of the officers, though perhaps not life-threatening, was real and might have been imminent, and it was not denied by the New Zealand physician who subsequently examined him. By contrast, in the case of the second officer, the justifications given (the need

³⁹⁰ There have also been cases involving the violation of a land frontier in order to save the life of a person in danger. See, e.g., the case of violation of the Austrian border by Italian soldiers in 1862: *Secretariat Survey*, para. 121.

³⁹¹ *Rainbow Warrior (New Zealand/France)*, *UNRIIAA*, vol. XX, p. 217 (1990), at pp. 254-255, para. 78.

³⁹² *Ibid.*, at p. 255, para. 79.

for medical examination on grounds of pregnancy and the desire to see a dying father) did not justify emergency action. The lives of the agent and the child were at no stage threatened and there were excellent medical facilities nearby. The Tribunal held that:

“[C]learly these circumstances entirely fail to justify France’s responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations ...”³⁹³

(5) The plea of distress is also accepted in many treaties as a circumstance justifying conduct which would otherwise be wrongful. Article 14 (3) of the 1958 Convention on the Territorial Sea and the Contiguous Zone permits stopping and anchoring by ships during their passage through foreign territorial seas in so far as this conduct is rendered necessary by distress. This provision is repeated in much the same terms in article 18 (2) of the 1982 Convention on the Law of the Sea.³⁹⁴ Similar provisions appear in the international conventions on the prevention of pollution at sea.³⁹⁵

(6) Article 24 is limited to cases where human life is at stake. The Tribunal in the *Rainbow Warrior* arbitration appeared to take a broader view of the circumstances justifying a plea of distress, apparently accepting that a serious health risk would suffice. The problem with extending article 24 to less than life-threatening situations is where to place any lower limit.

³⁹³ Ibid., at p. 263, para. 99.

³⁹⁴ United Nations Convention on the Law of the Sea, Montego Bay, United Nations, *Treaty Series*, vol. 1833, p. 397; see also arts. 39 (1) (c), 98 and 109.

³⁹⁵ See, e.g., International Convention for the Prevention of Pollution of the Sea by Oil, United Nations, *Treaty Series*, vol. 327, p. 3, art. IV (1) (a), providing that the prohibition on the discharge of oil into the sea does not apply if the discharge takes place “for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea”. See also the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, United Nations, *Treaty Series*, vol. 1046, p. 138, art V (1), which provides that the prohibition on dumping of wastes does not apply when it is “necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea ... in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping appears to be the only way of averting the threat ...”. Cf. also Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, Oslo, United Nations, *Treaty Series*, vol. 932, p. 3, art. 8 (1) International Convention for the Prevention of Pollution from Ships (MARPOL), United Nations, *Treaty Series*, vol. 1340, p. 184, Annex 1, regulation 11 (a).

In situations of distress involving aircraft there will usually be no difficulty in establishing that there is a threat to life, but other cases present a wide range of possibilities. Given the context of chapter V and the likelihood that there will be other solutions available for cases which are not apparently life-threatening, it does not seem necessary to extend the scope of distress beyond threats to life itself. In situations in which a State agent is in distress and has to act to save lives, there should however be a certain degree of flexibility in the assessment of the conditions of distress. The “no other reasonable way” criterion in article 24 seeks to strike a balance between the desire to provide some flexibility regarding the choices of action by the agent in saving lives and need to confine the scope of the plea having regard to its exceptional character.

(7) Distress may only be invoked as a circumstance precluding wrongfulness in cases where a State agent has acted to save his or her own life or where there exists a special relationship between the State organ or agent and the persons in danger. It does not extend to more general cases of emergencies, which are more a matter of necessity than distress.

(8) Article 24 only precludes the wrongfulness of conduct so far as it is necessary to avoid the life-threatening situation. Thus it does not exempt the State or its agent from complying with other requirements (national or international), e.g., the requirement to notify arrival to the relevant authorities, or to give relevant information about the voyage, the passengers or the cargo.³⁹⁶

(9) As in the case of *force majeure*, a situation which has been caused or induced by the invoking State is not one of distress. In many cases the State invoking distress may well have contributed, even if indirectly, to the situation. Priority should be given to necessary life-saving measures, however, and under subparagraph (2) (a), distress is only excluded if the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it. This is the same formula as that adopted in respect of article 23 (2) (a).³⁹⁷

³⁹⁶ See *Cushin and Lewis v. R*, [1935] Ex.C.R. 103 (even if a vessel enters a port in distress, it is not exempted from the requirement to report on its voyage). See also *The “Rebecca”* (United States of America-Mexico General Claims Commission) *A.J.I.L.* vol. 23 (1929), 860 (vessel entered port in distress; merchandise seized for customs offence: held, entry reasonably necessary in the circumstances and not a mere matter of convenience; seizure therefore unlawful); *“The May” v. R* [1931] S.C.R. 374; *The Ship “Queen City” v. R* [1931] S.C.R. 387; *R v. Flahaut* [1935] 2 D.L.R. 685 (test of “real and irresistible distress” applied).

³⁹⁷ See commentary to article 23, para. (9).

(10) Distress can only preclude wrongfulness where the interests sought to be protected (e.g., the lives of passengers or crew) clearly outweigh the other interests at stake in the circumstances. If the conduct sought to be excused endangers more lives than it may save or is otherwise likely to create a greater peril it will not be covered by the plea of distress. For instance, a military aircraft carrying explosives might cause a disaster by making an emergency landing, or a nuclear submarine with a serious breakdown might cause radioactive contamination to a port in which it sought refuge. Subparagraph 2 (b) stipulates that distress does not apply if the act in question is likely to create a comparable or greater peril. This is consistent with paragraph 1, which in asking whether the agent had “no other reasonable way” to save life establishes an objective test. The words “comparable or greater peril” must be assessed in the context of the overall purpose of saving lives.

Article 25

Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
 - (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
 - (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
 - (a) The international obligation in question excludes the possibility of invoking necessity; or
 - (b) The State has contributed to the situation of necessity.

Commentary

(1) The term “necessity” (“état de nécessité”) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. Under conditions narrowly defined in article 25, such a plea is recognized as a circumstance precluding wrongfulness.

(2) The plea of necessity is exceptional in a number of respects. Unlike consent (article 20), self-defence (article 21) or countermeasures (article 22), it is not dependent on the prior conduct of the injured State. Unlike *force majeure* (article 23), it does not involve conduct which is involuntary or coerced. Unlike distress (article 24), necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.³⁹⁸

(3) There is substantial authority in support of the existence of necessity as a circumstance precluding wrongfulness. It has been invoked by States and has been dealt with by a number of international tribunals. In these cases the plea of necessity has been accepted in principle, or at least not rejected.

(4) In an Anglo-Portuguese dispute of 1832, the Portuguese Government argued that the pressing necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances, had justified its appropriation of property owned by British subjects, notwithstanding a treaty stipulation. The British Government was advised that ...

“the Treaties between this Country and Portugal are [not] of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary

³⁹⁸ Perhaps the classic case of such an abuse was the occupation of Luxembourg and Belgium by Germany in 1914, which Germany sought to justify on the ground of the necessity. See, in particular, the note presented on 2 August 1914 by the German Minister in Brussels to the Belgian Minister for Foreign Affairs, in J.B. Scott (ed.), *Diplomatic Documents Relating to the Outbreak of the European War* (New York, Oxford University Press, 1916), Part I, pp. 749-750, and the speech in the Reichstag by the German Chancellor, von Bethmann-Hollweg, on 4 August 1914, containing the well-known words “wir sind jetzt in der Notwehr; und Not kennt kein Gebot!” (“we are in a state of self-defence and necessity knows no law”). *Jahrbuch des Völkerrechts*, vol. III (1916), p. 728.

to the safety, and even to the very existence of the State. The extent of the necessity, which will justify such an appropriation of the Property of British Subjects, must depend upon the circumstances of the particular case, but it must be imminent and urgent.”³⁹⁹

(5) The “*Caroline*” incident of 1837, though frequently referred to as an instance of self-defence, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it now has. In that case, British armed forces entered United States territory and attacked and destroyed a vessel owned by American citizens which was carrying recruits and military and other material to Canadian insurgents. In response to the American protests, the British Minister in Washington, Fox, referred to the “necessity of self-defence and self-preservation”; the same point was made by counsel consulted by the British Government, who stated that “the conduct of the British Authorities” was justified because it was “absolutely necessary as a measure of precaution”.⁴⁰⁰ Secretary of State Webster replied to Minister Fox that “nothing less than a clear and absolute necessity can afford ground of justification” for the commission “of hostile acts within the territory of a Power at Peace”, and observed that the British Government must prove that the action of its forces had really been caused by “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation”.⁴⁰¹ In his message to Congress of 7 December 1841, President Tyler reiterated that:

“This Government can never concede to any foreign Government the power, except in a case of the most urgent and extreme necessity, of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign Government ...”⁴⁰²

³⁹⁹ A.D. McNair (ed.), *International Law Opinions* (Cambridge, University Press, 1956), vol. II, p. 232.

⁴⁰⁰ See respectively W.R. Manning (ed.), *Diplomatic Correspondence of the United States: Canadian Relations 1784-1860* (Washington, Carnegie Endowment for International Peace, 1943), vol. III, p. 422; A.D. McNair (ed.), *International Law Opinions* (Cambridge, University Press, 1956), vol. II, p. 22.

⁴⁰¹ *British and Foreign State Papers*, vol. 29, p. 1129.

⁴⁰² *British and Foreign State Papers*, vol. 30, p. 194.

The incident was not closed until 1842, with an exchange of letters in which the two Governments agreed that “a strong overpowering necessity may arise when this great principle may and must be suspended”. “It must be so”, added Lord Ashburton, the British Government’s ad hoc envoy to Washington, “for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity.”⁴⁰³

(6) In the “Russian Fur Seals” controversy of 1893, the “essential interest” to be safeguarded against a “grave and imminent peril” was the natural environment in an area not subject to the jurisdiction of any State or to any international regulation. Facing the danger of extermination of a fur seal population by unrestricted hunting, the Russian Government issued a decree prohibiting sealing in an area of the high seas. In a letter to the British Ambassador dated 12/24 February 1893, the Russian Minister for Foreign Affairs explained that the action had been taken because of the “absolute necessity of immediate provisional measures” in view of the imminence of the hunting season. He “emphasize[d] the essentially precautionary character of the above-mentioned measures, which were taken under the pressure of exceptional circumstances”⁴⁰⁴ and declared his willingness to conclude an agreement with the British Government with a view to a longer-term settlement of the question of sealing in the area.

(7) In the *Russian Indemnity* case, the Ottoman Government, to justify its delay in paying its debt to the Russian Government, invoked among other reasons the fact that it had been in an extremely difficult financial situation, which it described as “*force majeure*” but which was more like a state of necessity. The arbitral tribunal accepted the plea in principle:

“*The exception of force majeure*, invoked in the first place, is arguable in international public law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits ... that the obligation for a State to execute treaties may be weakened ‘if the very existence of the State is endangered, if observation of the international duty is ... *self-destructive*’.”⁴⁰⁵

⁴⁰³ Ibid., p. 195. See Secretary of State Webster’s reply: *ibid.*, p. 201.

⁴⁰⁴ *British and Foreign State Papers*, vol. 86, p. 220; *Secretariat Survey*, para. 155.

⁴⁰⁵ *UNRIAA.*, vol. XI, p. 431 (1912), at p. 443; *Secretariat Survey*, para. 394.

It considered, however, that:

“It would be a manifest exaggeration to admit that the payment (or the contracting of a loan for the payment) of the relatively small sum of 6 million francs due to the Russian claimants would have imperilled the existence of the Ottoman Empire or seriously endangered its internal or external situation ...”⁴⁰⁶

In its view, compliance with an international obligation must be “self-destructive” for the wrongfulness of the conduct not in conformity with the obligation to be precluded.⁴⁰⁷

(8) In *Société Commerciale de Belgique*,⁴⁰⁸ the Greek Government owed money to a Belgian company under two arbitral awards. Belgium applied to the Permanent Court of International Justice for a declaration that the Greek Government, in refusing to carry out the awards, was in breach of its international obligations. The Greek Government pleaded the country’s serious budgetary and monetary situation.⁴⁰⁹ The Court noted that it was not within its mandate to declare whether the Greek Government was justified in not executing the arbitral awards. However, the Court implicitly accepted the basic principle, on which the two parties were in agreement.⁴¹⁰

⁴⁰⁶ Ibid.

⁴⁰⁷ A case in which the parties to the dispute agreed that very serious financial difficulties could justify a different mode of discharging the obligation other than that originally provided for arose in connection with the enforcement of the arbitral award in *Forests of Central Rhodope*, UNRIAA, vol. III, p. 1405 (1933): see League of Nations, *Official Journal*, 15th year, No. 11 (Part I) (November 1934), p. 1432.

⁴⁰⁸ *Société Commerciale de Belgique*, 1939, P.C.I.J., Series A/B, No. 78, p. 160.

⁴⁰⁹ P.C.I.J., Series C, No. 87, pp. 141, 190; *Secretariat Survey*, para. 278. See generally for the Greek arguments relative to the state of necessity, *ibid.*, paras. 276-287.

⁴¹⁰ *Société Commerciale de Belgique*, 1939, P.C.I.J., Series A/B, No. 78, p. 160; *Secretariat Survey*, para. 288. See also the *Serbian Loans* case, where the positions of the parties and the Court on the point were very similar: *Serbian Loans*, 1929, P.C.I.J., Series A, No. 20; *Secretariat Survey*, paras. 263-268; *French Company of Venezuela Railroads*, UNRIAA., vol. X, p. 285 (1902), at p. 353; *Secretariat Survey*, paras. 385-386. In his separate opinion in the *Oscar Chinn* case, Judge Anzilotti accepted the principle that “necessity may excuse the non-observance of international obligations” but denied its applicability on the facts: *Oscar Chinn*, 1934, P.C.I.J., Series A/B, No. 63, p. 65, at pp. 112-114.

(9) In March 1967 the Liberian oil tanker *Torrey Canyon* went aground on submerged rocks off the coast of Cornwall outside British territorial waters, spilling large amounts of oil which threatened the English coastline. After various remedial attempts had failed, the British Government decided to bomb the ship to burn the remaining oil. This operation was carried out successfully. The British Government did not advance any legal justification for its conduct, but stressed the existence of a situation of extreme danger and claimed that the decision to bomb the ship had been taken only after all other means had failed.⁴¹¹ No international protest resulted. A convention was subsequently concluded to cover future cases where intervention might prove necessary to avert serious oil pollution.⁴¹²

(10) In the *Rainbow Warrior* arbitration, the Arbitral Tribunal expressed doubt as to the existence of the excuse of necessity. It noted that the Commission's draft article "allegedly authorizes a State to take unlawful action invoking a state of necessity" and described the Commission's proposal as "controversial".⁴¹³

(11) By contrast, in the *Gabčíkovo-Nagymaros Project* case,⁴¹⁴ the International Court carefully considered an argument based on the Commission's draft article (now article 25), expressly accepting the principle while at the same time rejecting its invocation in the circumstances of that case. As to the principle itself, the International Court noted that the parties had both relied on the Commission's draft article as an appropriate formulation, and continued:

"The Court considers... that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding

⁴¹¹ *The "Torrey Canyon"*, Cmnd. 3246 (London, Her Majesty's Stationery Office, 1967).

⁴¹² International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, United Nations, *Treaty Series*, vol. 970, p. 211.

⁴¹³ *Rainbow Warrior (New Zealand/France)*, *UNRIAA*, vol. XX, p. 217 (1990), at p. 254. In *Libyan Arab Foreign Investment Company v. Republic of Burundi*, (1994), *I.L.R.*, vol. 96, p. 279 at p. 319, the tribunal declined to comment on the appropriateness of codifying the doctrine of necessity, noting that the measures taken by Burundi did not appear to have been the only means of safeguarding an essential interest against a grave and imminent peril.

⁴¹⁴ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports* 1997, p. 7.

wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words... Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met. In the present case, the following basic conditions... are relevant: it must have been occasioned by an 'essential interest' of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a 'grave and imminent peril'; the act being challenged must have been the 'only means' of safeguarding that interest; that act must not have 'seriously impair[ed] an essential interest' of the State towards which the obligation existed; and the State which is the author of that act must not have 'contributed to the occurrence of the state of necessity'. Those conditions reflect customary international law.”⁴¹⁵

(12) The plea of necessity was apparently in issue in the *Fisheries Jurisdiction* case.⁴¹⁶ Regulatory measures taken to conserve straddling stocks had been taken by the Northwest Atlantic Fisheries Organization but had, in Canada's opinion, proved ineffective for various reasons. By the Coastal Fisheries Protection Act 1994, Canada declared that the straddling stocks of the Grand Banks were “threatened with extinction”, and asserted that the purpose of the Act and regulations was “to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding”. Canadian officials subsequently boarded and seized a Spanish fishing ship, the *Estai*, on the high seas, leading to a conflict with the European Union and with Spain. The Spanish Government denied that the arrest could be justified by concerns as to conservation “since it violates the established provisions of the NAFO Convention to which Canada is a party”.⁴¹⁷ Canada disagreed, asserting that “the arrest

⁴¹⁵ Ibid., at pp. 40-41, paras. 51-52.

⁴¹⁶ *Fisheries Jurisdiction (Spain v. Canada)*, I.C.J. Reports 1998, p. 431.

⁴¹⁷ As cited in the Court's judgment: I.C.J. Reports 1998, p. 431 at p. 443, para. 20. For the EU protest of 10 March 1995, asserting that the arrest “cannot be justified by any means” see Mémoire Du Royaume d’Espagne (September 1995), para. 15.

of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen”.⁴¹⁸ The Court held that it had no jurisdiction over the case.⁴¹⁹

(13) The existence and limits of a plea of necessity have given rise to a long-standing controversy among writers. It was for the most part explicitly accepted by the early writers, subject to strict conditions.⁴²⁰ In the nineteenth century, abuses of necessity associated with the idea of “fundamental rights of States” led to a reaction against the doctrine. During the twentieth century, the number of writers opposed to the concept of state of necessity in international law increased, but the balance of doctrine has continued to favour the existence of the plea.⁴²¹

(14) On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25. The cases show that necessity has been invoked to preclude the

⁴¹⁸ I.C.J. reports 1998, p. 431 at p. 443, para. 20. See further the Canadian Counter-Memorial (February 1996), paras. 17-45.

⁴¹⁹ By an Agreed Minute between the EU and Canada, Canada undertook to repeal the regulations applying the 1994 Act to Spanish and Portuguese vessels in the NAFO area and to release the *Estai*. The parties expressly maintained their respective positions “on the conformity of the amendment of 25 May 1994 to Canada’s Coastal Fisheries Protection Act, and subsequent regulations, with customary international law and the NAFO Convention” and reserved “their ability to preserve and defend their rights in conformity with international law”. See Canada-European Community, Agreed Minute on the Conservation and Management of Fish Stocks, Brussels, 20 April 1995, *I.L.M.* (1995), vol. 34 p. 1260. See also the Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 8 September 1995, A/CONF.164/37.

⁴²⁰ See B. Ayala, *De jure et officiis bellicis et disciplina militari, libri tres* (1582, repr. Washington, Carnegie Institution, 1912), vol. II, p. 135; A. Gentili, *De iure belli, libri tres* (1612, repr. Oxford, Clarendon Press, 1933), vol. II, p. 351; H. Grotius, *De jure belli ac pacis, libri tres* (1646, repr. Oxford, Clarendon Press, 1925), vol. II, p. 193; S. Pufendorf, *De jure naturae et gentium, libri octo* (1688, repr. Oxford, Clarendon Press, 1934), vol. II, pp. 295-296; C. Wolff, *Jus gentium methodo scientifica pertractatum* (1764, repr. Oxford, Clarendon Press, 1934), vol. II, pp. 173-174; E. de Vattel, *Le droit des gens ou principes de la loi naturelle* (1758, repr. Washington, Carnegie Institution, 1916), vol. III, p. 149.

⁴²¹ For a review of the earlier doctrine, see Yearbook ... 1980, vol. II, Part One, pp. 47-49; and see also P.A. Pillitu, *Lo stato di necessita nel diritto internazionale* (Perugia, Universita di Perugia/Editrici Licosa, 1981); J. Barboza, “Necessity (Revisited) in International Law”, in J. Makarczyk (ed.), *Essays in Honour of Judge Manfred Lachs* (The Hague, Martinus Nijhoff, 1984), p. 27; R. Boed, “State of Necessity as a Justification for Internationally Wrongful Conduct”, *Yale Human Rights & Development Law Journal*, vol. 3 (2000) p. 1.

wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin.⁴²² It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population. But stringent conditions are imposed before any such plea is allowed. This is reflected in article 25. In particular, to emphasize the exceptional nature of necessity and concerns about its possible abuse, article 25 is cast in negative language (“Necessity may not be invoked... unless”).⁴²³ In this respect it mirrors the language of article 62 of the Vienna Convention on the Law of Treaties dealing with fundamental change of circumstances. It also mirrors that language in establishing, in paragraph (1), two conditions without which necessity may not be invoked and excluding, in paragraph (2), two situations entirely from the scope of the excuse of necessity.⁴²⁴

(15) The first condition, set out in subparagraph (1) (a), is that necessity may only be invoked to safeguard an essential interest from a grave and imminent peril. The extent to which a given interest is “essential” depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole. Whatever the interest may be, however, it is only when it is threatened by a grave and imminent peril that this condition is satisfied. The peril has to be objectively established and not merely apprehended as possible. In addition to being grave, the peril has to be imminent in the sense of proximate. However, as the Court in the *Gabčíkovo-Nagymaros Project* case said:

“That does not exclude ... that a ‘peril’ appearing in the long term might be held to be ‘imminent’ as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.”⁴²⁵

⁴²² Generally on the irrelevance of the source of the obligation breached, see article 12 and commentary.

⁴²³ This negative formulation was referred to by the Court in *Gabčíkovo-Nagymaros Project*, *I.C.J. Reports 1997*, p. 7, at p. 40, para. 51.

⁴²⁴ A further exclusion, common to all the circumstances precluding wrongfulness, concerns peremptory norms: see article 26 and commentary.

⁴²⁵ *I.C.J. Reports 1997*, p. 42, para. 54.

Moreover the course of action taken must be the “only way” available to safeguard that interest. The plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient. Thus in the *Gabčíkovo-Nagymaros Project* case, the Court was not convinced that the unilateral suspension and abandonment of the Project was the only course open in the circumstances, having regard in particular to the amount of work already done and the money expended on it, and the possibility of remedying any problems by other means.⁴²⁶

The word “ways” in subparagraph (1) (a) is not limited to unilateral action but may also comprise other forms of conduct available through cooperative action with other States or through international organizations (for example, conservation measures for a fishery taken through the competent regional fisheries agency). Moreover the requirement of necessity is inherent in the plea: any conduct going beyond what is strictly necessary for the purpose will not be covered.

(16) It is not sufficient for the purposes of subparagraph (1) (a) that the peril is merely apprehended or contingent. It is true that in questions relating, for example, to conservation and the environment or to the safety of large structures, there will often be issues of scientific uncertainty and different views may be taken by informed experts on whether there is a peril, how grave or imminent it is and whether the means proposed are the only ones available in the circumstances. By definition, in cases of necessity the peril will not yet have occurred. In the *Gabčíkovo-Nagymaros Project* case the Court noted that the invoking State could not be the sole judge of the necessity,⁴²⁷ but a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time.

(17) The second condition for invoking necessity, set out in subparagraph (1) (b), is that the conduct in question must not seriously impair an essential interest of the other State or States concerned, or of the international community as a whole.⁴²⁸ In other words, the interest relied on

⁴²⁶ Ibid., pp. 42-43, para. 55.

⁴²⁷ Ibid., p. 40, para. 51.

⁴²⁸ See para. (18) of the commentary, below.

must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective.⁴²⁹

(18) As a matter of terminology, it is sufficient to use the phrase “international community as a whole” rather than “international community of States as a whole”, which is used in the specific context of article 53 of the Vienna Convention on the Law of Treaties. The insertion of the words “of States” in article 53 of the Vienna Convention was intended to stress the paramountcy that States have over the making of international law, including especially the establishment of norms of a peremptory character. On the other hand the International Court used the phrase “international community as a whole” in the *Barcelona Traction* case,⁴³⁰ and it is frequently used in treaties and other international instruments in the same sense as in article 25 (1) (b).⁴³¹

(19) Over and above the conditions in article 25 (1), article 25 (2) lays down two general limits to any invocation of necessity. This is made clear by the use of the words “in any case”. subparagraph (2) (a) concerns cases where the international obligation in question explicitly or implicitly excludes reliance on necessity. Thus certain humanitarian conventions applicable to

⁴²⁹ In the *Gabčíkovo-Nagymaros Project* case the Court affirmed the need to take into account any countervailing interest of the other State concerned: *I.C.J. Reports 1997*, p. 7, at p. 46, para. 58.

⁴³⁰ *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33.

⁴³¹ See, e.g., Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, United Nations, *Treaty Series*, vol. 1035, p. 167, preambular para. 3; International Convention against the Taking of Hostages, United Nations, *Treaty Series*, vol. 1316, p. 205, preambular para. 4; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March 1988, I.M.O. Document SUA/CONF/15/Rev.1; *I.L.M.*, vol. 27 (1988), p. 665, preambular para. 5; Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, (A/RES/49/59), preambular para. 3; International Convention for the Suppression of Terrorist Bombings, 15 December 1997, A/RES/52/164, preambular para. 10; Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, preambular para. 9; International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, A/RES/54/109, opened for signature 10 January 2000, preambular para. 9.

armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.

(20) According to subparagraph (2) (b), necessity may not be relied on if the responsible State has contributed to the situation of necessity. Thus in the *Gabčíkovo-Nagymaros Project* case, the Court considered that because Hungary had “helped, by act or omission to bring” about the situation of alleged necessity, it could not now rely on that situation as a circumstance precluding wrongfulness.⁴³² For a plea of necessity to be precluded under subparagraph (2) (b), the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral. Subparagraph (2) (b) is phrased in more categorical terms than articles 23 (2) (a) and 24 (2) (a), because necessity needs to be more narrowly confined.

(20) As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of “military necessity”. It is true that in a few cases, the plea of necessity has been invoked to excuse military action abroad, in particular in the context of claims to humanitarian intervention.⁴³³ The question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law is not covered by article 25.⁴³⁴ The same thing is true of the doctrine of “military necessity” which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty

⁴³² “*I.C.J. Reports 1997*”, p. 7, at p. 46, para. 57.

⁴³³ E.g., in 1960 Belgium invoked necessity to justify its military intervention in the Congo. The matter was discussed in the Security Council but not in terms of the plea of necessity as such. See *S.C.O.R., Fifteenth Year*, 873rd meeting., 13/14 July 1960, paras. 144, 182, 192; 877th meeting., 20/21 July 1960, paras. 31 ff, 142; 878th meeting., 21 July 1960, paras. 23, 65; 879th meeting., 21/22 July 1960, paras. 80 ff, 118, 151. For the “*Caroline*” incident, see above, para. (5).

⁴³⁴ See also article 26 and commentary for the general exclusion of from the scope of circumstances precluding wrongfulness of conduct in breach of a peremptory norm.

provisions in the field of international humanitarian law.⁴³⁵ In both respects, while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.⁴³⁶

Article 26

Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Commentary

(1) In accordance with article 53 of the Vienna Convention on the Law of Treaties, a treaty which conflicts with a peremptory norm of general international law is void. Under article 64, an earlier treaty which conflicts with a new peremptory norm becomes void and terminates.⁴³⁷ The question is what implications these provisions may have for the matters dealt with in chapter V.

⁴³⁵ See e.g. art. 23 (g) of the Hague Regulations respecting the Laws and Customs of War on Land (annexed to Convention II of 1899 and Convention IV of 1907), which prohibits the destruction of enemy property “unless such destruction or seizure be imperatively demanded by the necessities of war”: J.B. Scott (ed.), *The Proceedings of the Hague Peace Conferences: the Conference of 1907* (New York, Oxford University Press, 1920) vol. I, p. 623. Similarly, art. 54 (5) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), United Nations, *Treaty Series*, vol. 1125, p. 3, appears to permit attacks on objects indispensable to the survival of the civilian population if “imperative military necessity” so requires.

⁴³⁶ See e.g., M. Huber, “Die kriegsrechtlichen Verträge und die Kriegsraison”, *Zeitschrift für Völkerrecht*, vol. VII (1913), p. 351; D. Anzilotti, *Corso di diritto internazionale* (Rome, Athenaeum, 1915), vol. III, p. 207; C. de Visscher, “Les lois de la guerre et la théorie de la nécessité”, *R.G.D.I.P.*, vol. XXIV (1917), p. 74; N.C.H. Dunbar, “Military necessity in war crimes trials”, *B.Y.I.L.*, vol. 29 (1952), p. 442; C. Greenwood, “Historical Development and Legal Basis”, in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford, Oxford University Press, 1995), p. 1 at pp. 30-33; Y. Dinstein, “Military Necessity”, in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam, North Holland, 1997), vol. III, pp. 395-397.

⁴³⁷ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331. See also art. 44 (5), which provides that in cases falling under art. 53, no separation of the provisions of the treaty is permitted.

(2) Fitzmaurice as Special Rapporteur on the Law of Treaties treated this question on the basis of an implied condition of “continued compatibility with international law”, noting that:

“A treaty obligation the observance of which is incompatible with a new rule or prohibition of international law in the nature of *jus cogens* will justify (and require) non-observance of any treaty obligation involving such incompatibility... The same principle is applicable where circumstances arise subsequent to the conclusion of a treaty, bringing into play an existing rule of international law which was not relevant to the situation as it existed at the time of the conclusion of the treaty.”⁴³⁸

The Commission did not however propose any specific articles on this question, apart from articles 53 and 64 themselves.

(3) Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The processes of interpretation and application should resolve such questions without any need to resort to the secondary rules of State responsibility. In theory one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred.⁴³⁹ Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts.

(4) It is however desirable to make it clear that the circumstances precluding wrongfulness in chapter V of Part One do not authorize or excuse any derogation from a peremptory norm of general international law. For example, a State taking countermeasures may not derogate from

⁴³⁸ Fitzmaurice, “Fourth Report on the Law of Treaties”, *Yearbook ... 1959*, vol. II, p. 46. See also S. Rosenne, *Breach of Treaty* (Cambridge, Grotius, 1985), p. 63.

⁴³⁹ For a possible analogy see the remarks of Judge ad hoc Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993*, *I.C.J. Reports 1993*, p. 325, at pp. 439-441. The Court did not address these issues in its Order.

such a norm: for example, a genocide cannot justify a counter-genocide.⁴⁴⁰ The plea of necessity likewise cannot excuse the breach of a peremptory norm. It would be possible to incorporate this principle expressly in each of the articles of chapter V, but it is both more economical and more in keeping with the overriding character of this class of norms to deal with the basic principle separately. Hence article 26 provides that nothing in chapter V can preclude the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.⁴⁴¹

(5) The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of States as a whole. So far, relatively few peremptory norms have been recognized as such. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties.⁴⁴² Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.⁴⁴³

(6) In accordance with article 26, circumstances precluding wrongfulness cannot justify or excuse a breach of a State's obligations under a peremptory rule of general international law. Article 26 does not address the prior issue whether there has been such a breach in any given

⁴⁴⁰ As the International Court noted in its decision on counterclaims in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, "in no case could one breach of the Convention serve as an excuse for another": *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-Claims*, *I.C.J. Reports 1997*, p. 243, at p. 258, para. 35.

⁴⁴¹ For convenience this limitation is spelt out again in the context of countermeasures in Part Three, chapter II. See article 50 and commentary, paras.(9) and (10).

⁴⁴² See, e.g. the decisions of the International Criminal Tribunal for the former Yugoslavia in Case IT-95-17/1-T, *Prosecutor v. Anto Furundzija*, judgment of 10 December 1998; *I.L.M.*, vol. 38 (1999), p. 317, and of the English House of Lords in *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [1999] 2 All ER 97, esp. at pp. 108-109, and 114-115 (Lord Browne-Wilkinson). Cf. *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, p. 226, at p. 257, para. 79.

⁴⁴³ Cf. *East Timor (Portugal v. Australia)*, *I.C.J. Reports 1995*, p. 90, at p. 102, para.. 29.

case. This has particular relevance to certain articles in chapter V. One State cannot dispense another from the obligation to comply with a peremptory norm, e.g. in relation to genocide or torture, whether by treaty or otherwise.⁴⁴⁴ But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility.⁴⁴⁵

Article 27

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

- (a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
- (b) The question of compensation for any material loss caused by the act in question.

Commentary

(1) Article 27 is a without prejudice clause dealing with certain incidents or consequences of invoking circumstances precluding wrongfulness under chapter V. It deals with two issues. First, it makes it clear that circumstances precluding wrongfulness do not as such affect the underlying obligation, so that if the circumstance no longer exists the obligation regains full force and effect. Second, it refers to the possibility of compensation in certain cases. Article 27 is framed as a without prejudice clause, because, as to the first point, it may be that the effect of the facts which disclose a circumstance precluding wrongfulness may also give rise to the termination of the obligation, and as to the second point, because it is not possible to specify in general terms when compensation is payable.

(2) Subparagraph (a) of article 27 addresses the question of what happens when a condition preventing compliance with an obligation no longer exists or gradually ceases to operate. It makes it clear that chapter V has a merely preclusive effect. When and to the extent that a

⁴⁴⁴ See commentary to article 45, para (4).

⁴⁴⁵ See commentary to article 20, paras. (4)-(7).

circumstance precluding wrongfulness ceases, or ceases to have its preclusive effect for any reason, the obligation in question (assuming it is still in force) will again have to be complied with, and the State whose earlier non-compliance was excused must act accordingly. The words “and to the extent” are intended to cover situations in which the conditions preventing compliance gradually lessen and allow for partial performance of the obligation.

(3) This principle was affirmed by the Tribunal in the *Rainbow Warrior* arbitration,⁴⁴⁶ and even more clearly by the International Court in the *Gabčíkovo-Nagymaros Project* case.⁴⁴⁷ In considering Hungary’s argument that the wrongfulness of its conduct in discontinuing work on the Project was precluded by a state of necessity, the Court remarked that “ [a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.”⁴⁴⁸

It may be that the particular circumstances precluding wrongfulness are, at the same time, a sufficient basis for terminating the underlying obligation. Thus a breach of a treaty justifying countermeasures may be “material” in terms of article 60 of the 1969 Vienna Convention and permit termination of the treaty by the injured State. Conversely, the obligation may be fully reinstated or its operation fully restored in principle, but modalities for resuming performance may need to be settled. These are not matters which article 27 can resolve, other than by providing that the invocation of circumstances precluding wrongfulness is without prejudice to “compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists”. Here “compliance with the obligation in question” includes cessation of the wrongful conduct.

(4) Subparagraph (b) of article 27 is a reservation as to questions of possible compensation for damage in cases covered by chapter V. Although article 27 (b) uses the term “compensation”, it is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of article 34. Rather it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected. The reference

⁴⁴⁶ *Rainbow Warrior (New Zealand/France)*, UNRIAA., vol. XX, p. 217 (1990), at pp. 251-252, para. 75.

⁴⁴⁷ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7.

⁴⁴⁸ Ibid., at p. 63, para 101; see also ibid., at p. 38, para. 47.

to “material loss” is narrower than the concept of damage elsewhere in the articles: article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V.

(5) Subparagraph (b) is a proper condition, in certain cases, for allowing a State to rely on a circumstance precluding wrongfulness. Without the possibility of such recourse the State whose conduct would otherwise be unlawful might seek to shift the burden of the defence of its own interests or concerns on to an innocent third State. This principle was accepted by Hungary in invoking the plea of necessity in the *Gabčíkovo-Nagymaros Project* case. As the Court noted, “Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.”⁴⁴⁹

(6) Subparagraph (b) does not attempt to specify in what circumstances compensation should be payable. Generally the range of possible situations covered by chapter V is such that to lay down a detailed regime for compensation is not appropriate. It will be for the State invoking a circumstance precluding wrongfulness to agree with any affected States on the possibility and extent of compensation payable in a given case.

PART TWO

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

(1) Whereas Part One of the Articles defines the general conditions necessary for State responsibility to arise, Part Two deals with the legal consequences for the responsible State. It is true that a State may face legal consequences of conduct which is internationally wrongful outside the sphere of State responsibility. For example, a material breach of a treaty may give an injured State the right to terminate or suspend the treaty in whole or in part.⁴⁵⁰ The focus of Part Two, however, is on the new legal relationship which arises upon the commission by a State of an internationally wrongful act. This constitutes the substance or content of the international responsibility of a State under the Articles.

⁴⁴⁹ Ibid., at p. 39, para. 48. A separate issue was that of accounting for accrued costs associated with the Project: *ibid.*, at p. 81, paras. 152-153.

⁴⁵⁰ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 60.

(2) Within the sphere of State responsibility, the consequences which arise by virtue of an internationally wrongful act of a State may be specifically provided for in such terms as to exclude other consequences, in whole or in part.⁴⁵¹ In the absence of any specific provision, however, international law attributes to the responsible State new obligations, and in particular the obligation to make reparation for the harmful consequences flowing from that act. The close link between the breach of an international obligation and its immediate legal consequence in the obligation of reparation was recognized in article 36 (2) of the Statute of the Permanent Court of International Justice, which was carried over without change as article 36 (2) of the Statute of the International Court. In accordance with article 36 (2), States parties to the Statute may recognize as compulsory the Court's jurisdiction, *inter alia*, in all legal disputes concerning ...

“(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation.”

Part One of the Articles sets out the general legal rules applicable to the question identified in subparagraph (c), while Part Two does the same for subparagraph (d).

(3) Part Two consists of three chapters. Chapter I sets out certain general principles and specifies more precisely the scope of Part Two. Chapter II focuses on the forms of reparation (restitution, compensation, satisfaction) and the relations between them. Chapter III deals with the special situation which arises in case of a serious breach of an obligation arising under a peremptory norm of general international law, and specifies certain legal consequences of such breaches, both for the responsible State and for other States.

Chapter I

General principles

(1) Chapter I of Part Two comprises six articles, which define in general terms the legal consequences of an internationally wrongful act of a State. Individual breaches of international law can vary across a wide spectrum from the comparatively trivial or minor up to cases which imperil the survival of communities and peoples, the territorial integrity and political independence of States and the environment of whole regions. This may be true whether the

⁴⁵¹ On the *lex specialis* principle in relation to State responsibility see article 55 and commentary.

obligations in question are owed to one other State or to some or all States or to the international community as a whole. But over and above the gravity or effects of individual cases, the rules and institutions of State responsibility are significant for the maintenance of respect for international law and for the achievement of the goals which States advance through law-making at the international level.

(2) Within chapter I, article 28 is an introductory article, affirming the principle that legal consequences are entailed whenever there is an internationally wrongful act of that State. Article 29 indicates that these consequences are without prejudice to, and do not supplant, the continued obligation of the responsible State to perform the obligation breached. This point is carried further by article 30, which deals with the obligation of cessation and assurances or guarantees of non-repetition. Article 31 sets out the general obligation of reparation for injury suffered in consequence of a breach of international law by a State. Article 32 makes clear that the responsible State may not rely on its internal law to avoid the obligations of cessation and reparation arising under Part Two. Finally, article 33 specifies the scope of the Part, both in terms of the States to which obligations are owed and also in terms of certain legal consequences which, because they accrue directly to persons or entities other than States, are not covered by Parts Two or Three of the Articles.

Article 28

Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

Commentary

(1) Article 28 serves an introductory function for Part Two and is expository in character. It links the provisions of Part One which define when the international responsibility of a State arises with the provisions of Part Two which set out the legal consequences which responsibility for an internationally wrongful act involves.

(2) The core legal consequences of an internationally wrongful act set out in Part Two are the obligations of the responsible State to cease the wrongful conduct (article 30) and to make full reparation for the injury caused by the internationally wrongful act (article 31). Where the internationally wrongful act constitutes a serious breach by the State of an obligation arising under a peremptory norm of general international law, the breach may entail further

consequences both for the responsible State and for other States. In particular, all States in such cases have obligations to cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach, and not to render aid or assistance to the responsible State in maintaining the situation so created (articles 40, 41).

(3) Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations *of* the State and not only those owed *to* other States. Thus State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State. However, while Part One applies to all the cases in which an internationally wrongful act may be committed by a State, Part Two has a more limited scope. It does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State. In other words, the provisions of Part Two are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State, and article 33 makes this clear.

Article 29

Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.

Commentary

(1) Where a State commits a breach of an international obligation, questions as to the restoration and future of the legal relationship thereby affected are central. Apart from the question of reparation, two immediate issues arise, namely, the effect of the responsible State's conduct on the obligation which has been breached, and cessation of the breach if it is continuing. The former question is dealt with by article 29, the latter by article 30.

(2) Article 29 states the general principle that the legal consequences of an internationally wrongful act do not affect the continued duty of the State to perform the obligation it has breached. As a result of the internationally wrongful act, a new set of legal relations is

established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal relation established by the primary obligation disappears. Even if the responsible State complies with its obligations under Part Two to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby of the duty to perform the obligation breached. The continuing obligation to perform an international obligation, notwithstanding a breach, underlies the concept of a continuing wrongful act (see article 14) and the obligation of cessation (see article 30 (a)).

(3) It is true that in some situations the ultimate effect of a breach of an obligation may be to put an end to the obligation itself. For example a State injured by a material breach of a bilateral treaty may elect to terminate the treaty.⁴⁵² But as the relevant provisions of the Vienna Convention on the Law of Treaties make clear, the mere fact of a breach and even of a repudiation of a treaty does not terminate the treaty.⁴⁵³ It is a matter for the injured State to react to the breach to the extent permitted by the Vienna Convention. The injured State may have no interest in terminating the treaty as distinct from calling for its continued performance. Where a treaty is duly terminated for breach, the termination does not affect legal relationships which have accrued under the treaty prior to its termination, including the obligation to make reparation for any breach.⁴⁵⁴ A breach of an obligation under general international law is even less likely to affect the underlying obligation, and indeed will never do so *as such*. By contrast the secondary legal relation of State responsibility arises on the occurrence of a breach and without any requirement of invocation by the injured State.

⁴⁵² Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 60.

⁴⁵³ Indeed in the *Gabčíkovo-Nagymaros Project* case, the Court held that continuing material breaches by both parties did not have the effect of terminating the 1977 Treaty: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports 1997*, p. 7, at p. 68, para. 114.

⁴⁵⁴ See e.g. *Rainbow Warrior (New Zealand/France)*, *UNRIAA*, vol. XX, p. 217 (1990), at p. 266, citing President McNair (dissenting) in *Ambatielos, Preliminary Objection*, *I.C.J. Reports 1952*, p. 28, at p. 63. On that particular point the Court itself agreed: *ibid.*, at p. 45. In the *Gabčíkovo-Nagymaros Project* case, Hungary accepted that the legal consequences of its termination of the 1977 Treaty on account of Czechoslovakia's breach were prospective only, and did not affect the accrued rights of either party: *I.C.J. Reports 1997*, p. 7, at pp. 73-74, paras. 125-127. The Court held that the Treaty was still in force, and therefore did not address the question.

(4) Article 29 does not need to deal with such contingencies. All it provides is that the legal consequences of an internationally wrongful act within the field of State responsibility do not affect any continuing duty to comply with the obligation which has been breached. Whether and to what extent that obligation subsists despite the breach is a matter not regulated by the law of State responsibility but by the rules concerning the relevant primary obligation.

Article 30

Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

- (a) To cease that act, if it is continuing;
- (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Commentary

(1) Article 30 deals with two separate but linked issues raised by the breach of an international obligation: the cessation of the wrongful conduct and the offer of assurances and guarantees of non-repetition by the responsible State if circumstances so require. Both are aspects of the restoration and repair of the legal relationship affected by the breach. Cessation is, as it were, the negative aspect of future performance, concerned with securing an end to continuing wrongful conduct, whereas assurances and guarantees serve a preventive function and may be described as a positive reinforcement of future performance. The continuation in force of the underlying obligation is a necessary assumption of both, since if the obligation has ceased following its breach, the question of cessation does not arise and no assurances and guarantees can be relevant.⁴⁵⁵

(2) Subparagraph (a) of article 30 deals with the obligation of the State responsible for the internationally wrongful act to cease the wrongful conduct. In accordance with article 2, the word “act” covers both acts and omissions. Cessation is thus relevant to all wrongful acts extending in time “regardless of whether the conduct of a State is an action or omission ... since there may be cessation consisting in abstaining from certain actions ...”.⁴⁵⁶

⁴⁵⁵ Cf. Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 70 (1).

⁴⁵⁶ *Rainbow Warrior*, *UNRIIAA*, vol. XX, p. 217 (1990), at p. 270, para. 113.

(3) The Tribunal in the *Rainbow Warrior* arbitration stressed “two essential conditions intimately linked” for the requirement of cessation of wrongful conduct to arise, “namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued”.⁴⁵⁷ While the obligation to cease wrongful conduct will arise most commonly in the case of a continuing wrongful act,⁴⁵⁸ article 30 also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions. The phrase “if it is continuing” at the end of subparagraph (a) of the article is intended to cover both situations.

(4) Cessation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct. With reparation, it is one of the two general consequences of an internationally wrongful act. Cessation is often the main focus of the controversy produced by conduct in breach of an international obligation.⁴⁵⁹ It is frequently demanded not only by States but also by the organs of international organizations such as the General Assembly and Security Council in the face of serious breaches of international law. By contrast reparation, important though it is in many cases, may not be the central issue in a dispute between States as to questions of responsibility.⁴⁶⁰

⁴⁵⁷ Ibid., at p. 270, para. 114.

⁴⁵⁸ For the concept of a continuing wrongful act, see commentary to article 14, paras. (3)-(11).

⁴⁵⁹ The focus of the WTO Dispute Settlement Mechanism is on cessation rather than reparation: Agreement establishing the World Trade Organization, 15 April 1994, Annex 2, Understanding on Rules and Procedures governing the Settlement of Disputes, esp. art. 3 (7), which provides for compensation “only if the immediate withdrawal of the measure is impractical and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement”. On the distinction between cessation and reparation for WTO purposes see e.g. *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, Panel Report, 21 January 2000 (WTO doc. WT/DS126/RW), para. 6.49.

⁴⁶⁰ For cases where the International Court has recognized that this may be so see, e.g., *Fisheries Jurisdiction, Merits, (Federal Republic of Germany v. Iceland)*, I.C.J. Reports 1974, p. 175, at pp. 201-205, paras. 65-76; *Gabčíkovo-Nagymaros Project*, I.C.J. Reports 1997, p. 7, at p. 81, para. 153. See further C. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), pp. 77-92.

(5) The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law.

(6) There are several reasons for treating cessation as more than simply a function of the duty to comply with the primary obligation. First, the question of cessation only arises in the event of a breach. What must then occur depends not only on the interpretation of the primary obligation but also on the secondary rules relating to remedies, and it is appropriate that they are dealt with, at least in general terms, in Articles concerning the consequences of an internationally wrongful act. Secondly, continuing wrongful acts are a common feature of cases involving State responsibility and are specifically dealt with in article 14. There is a need to spell out the consequences of such acts in Part Two.

(7) The question of cessation often arises in close connection with that of reparation, and particularly restitution. The result of cessation may be indistinguishable from restitution, for example in cases involving the freeing of hostages or the return of objects or premises seized. Nonetheless the two must be distinguished. Unlike restitution, cessation is not subject to limitations relating to proportionality.⁴⁶¹ It may give rise to a continuing obligation, even when literal return to the *status quo ante* is excluded or can only be achieved in an approximate way.

(8) The difficulty of distinguishing between cessation and restitution is illustrated by the *Rainbow Warrior* arbitration. New Zealand sought the return of the two agents to detention on the island of Hao. According to New Zealand, France was obliged to return them to and to detain them on the island for the balance of the three years; that obligation had not expired since time spent off the island was not to be counted for that purpose. The Tribunal disagreed. In its view, the obligation was for a fixed term which had expired, and there was no question of cessation.⁴⁶² Evidently the return of the two agents to the island was of no use to New Zealand if there was no continuing obligation on the part of France to keep them there. Thus a return to the *status quo ante* may be of little or no value if the obligation breached no longer exists.

⁴⁶¹ See article 35 (b) and commentary.

⁴⁶² *UNRIAA*, vol. XX, p. 217 (1990), at p. 266, para. 105.

Conversely, no option may exist for an injured State to renounce restitution if the continued performance of the obligation breached is incumbent upon the responsible State and the former State is not competent to release it from such performance. The distinction between cessation and restitution may have important consequences in terms of the obligations of the States concerned.

(9) Subparagraph (b) of article 30 deals with the obligation of the responsible State to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. Assurances and guarantees are concerned with the restoration of confidence in a continuing relationship, although they involve much more flexibility than cessation and are not required in all cases. They are most commonly sought when the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily. For example, following repeated demonstrations against the United States Embassy in Moscow in 1964-1965, President Johnson stated that ...

“The U.S. Government must insist that its diplomatic establishments and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between States. Expressions of regret and compensation are no substitute for adequate protection.”⁴⁶³

Such demands are not always expressed in terms of assurances or guarantees, but they share the characteristics of being future-looking and concerned with other potential breaches. They focus on prevention rather than reparation and they are included in article 30.

(10) The question whether the obligation to offer assurances or guarantees of non-repetition may be a legal consequence of an internationally wrongful act was debated in the *LaGrand* case.⁴⁶⁴ This concerned an admitted failure of consular notification contrary to article 36 of the Vienna Convention on Consular Relations of 1963. In its fourth submission Germany sought both general and specific assurances and guarantees as to the means of future compliance with the Convention. The United States argued that to give such assurances or guarantees went beyond the scope of the obligations in the Convention and that the Court lacked jurisdiction to require them. In any event, formal assurances and guarantees were unprecedented and should

⁴⁶³ Reprinted in *I.L.M.*, vol. IV (1965), p. 698.

⁴⁶⁴ *LaGrand (Germany v. United States of America)*, *Merits*, judgment of 27 June 2001.

not be required. Germany's entitlement to a remedy did not extend beyond an apology, which the United States had given. Alternatively no assurances or guarantees were appropriate in light of the extensive action it had taken to ensure that federal and State officials would in future comply with the Convention. On the question of jurisdiction the Court held ...

“that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation. Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.”⁴⁶⁵

On the question of appropriateness, the Court noted that an apology would not be sufficient in any case in which a foreign national had been “subjected to prolonged detention or sentenced to severe penalties” following a failure of consular notification.⁴⁶⁶ But in the light of information provided by the United States as to the steps taken to comply in future, the Court held ...

“that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), must be regarded as meeting Germany's request for a general assurance of non-repetition.”⁴⁶⁷

As to the specific assurances sought by Germany, the Court limited itself to stating that ...

“... if the United States, notwithstanding its commitment referred to ... should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a

⁴⁶⁵ Ibid., para. 48, citing *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, p. 22.

⁴⁶⁶ *LaGrand, Merits*, judgment of 27 June 2001, para. 123.

⁴⁶⁷ Ibid., para. 124; see also the *dispositif*, para. 128 (6).

conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.”⁴⁶⁸

The Court thus upheld its jurisdiction on Germany’s fourth submission and responded to it in the *dispositif*. It did not, however, discuss the legal basis for assurances of non-repetition.

(11) Assurances or guarantees of non-repetition may be sought by way of satisfaction (e.g., the repeal of the legislation which allowed the breach to occur), and there is thus some overlap between the two in practice.⁴⁶⁹ However they are better treated as an aspect of the continuation and repair of the legal relationship affected by the breach. Where assurances and guarantees of non-repetition are sought by an injured State, the question is essentially the reinforcement of a continuing legal relationship and the focus is on the future, not the past. In addition, assurances and guarantees of non-repetition may be sought by a State other than an injured State in accordance with article 48.

(12) Assurances are normally given verbally, while guarantees of non-repetition involve something more - for example, preventive measures to be taken by the responsible State designed to avoid repetition of the breach. With regard to the kind of guarantees that may be requested international practice is not uniform. The injured State usually demands either safeguards against the repetition of the wrongful act without any specification of the form they are to take⁴⁷⁰ or, when the wrongful act affects its nationals, assurances of better protection of persons and property.⁴⁷¹ In the *LaGrand* case, the Court spelled out with some specificity the obligation that would arise for the United States from a future breach, but added that “[t]his obligation can be carried out in various ways. The choice of means must be left to the

⁴⁶⁸ Ibid., para. 125. See also *ibid.*, para. 127, and the *dispositif*, para. 128 (7).

⁴⁶⁹ See commentary to article 36, para. (5).

⁴⁷⁰ In the “Dogger Bank” incident in 1904, the United Kingdom sought “security against the recurrence of such intolerable incidents”: Martens, *Nouveau Recueil*, 2nd series, vol. XXXIII, p. 642. See also the exchange of notes between China and Indonesia following the attack in March 1966 against the Chinese Consulate General at Jakarta, in which the Chinese Deputy Minister for Foreign Affairs sought a guarantee that such incidents would not be repeated in the future: *R.G.D.I.P.*, vol. 70 (1966), p. 1013.

⁴⁷¹ Such assurances were given in the “Doane” incident (1886): Moore, *Digest*, vol. VI, pp. 345-346.

United States”.⁴⁷² It noted further that a State may not be in a position to offer a firm guarantee of non-repetition.⁴⁷³ Whether it could properly do so would depend on the nature of the obligation in question.

(13) In some cases, the injured State may ask the responsible State to adopt specific measures or to act in a specified way in order to avoid repetition. Sometimes the injured State merely seeks assurances from the responsible State that, in future, it will respect the rights of the injured State.⁴⁷⁴ In other cases, the injured State requires specific instructions to be given,⁴⁷⁵ or other specific conduct to be taken.⁴⁷⁶ But assurances and guarantees of non-repetition will not always be appropriate, even if demanded. Much will depend on the circumstances of the case, including the nature of the obligation and of the breach. The rather exceptional character of the measures is indicated by the words “if the circumstances so require” at the end of subparagraph (b). The obligation of the responsible State with respect to assurances and guarantees of non-repetition is formulated in flexible terms in order to prevent the kinds of abusive or excessive claims which characterized some demands for assurances and guarantees by States in the past.

⁴⁷² *LaGrand, Merits*, judgment of 27 June 2001, para. 125.

⁴⁷³ *Ibid.*, para. 124.

⁴⁷⁴ See e.g. the 1901 case in which the Ottoman Empire gave a formal assurance that the British, Austrian and French postal services would henceforth operate freely in its territory: *R.G.D.I.P.*, vol. 8 (1901), p. 777, at pp. 788, 792.

⁴⁷⁵ See e.g. the incidents involving *The “Herzog”* and *The “Bundesrath”*, two German ships seized by the British Navy in December 1899 and January 1900, during the Boer war, in which Germany drew the attention of Great Britain to “the necessity for issuing instructions to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war”: Martens, *Nouveau Recueil*, 2nd series, vol. XXIX, pp. 456, 486.

⁴⁷⁶ In the *Trail Smelter* case, the arbitral tribunal specified measures to be adopted by the Trail Smelter, including measures designed to “prevent future significant fumigations in the United States”: *Trail Smelter (United States of America/Canada)*, *UNRIAA*, vol. III, p. 1905 (1938, 1941), at p. 1934. Requests to modify or repeal legislation are frequently made by international bodies. See, e.g., the decisions of the Human Rights Committee: *Torres Ramirez v. Uruguay*, decision of 23 July 1980, para. 19, A/35/40, p. 126; *Lanza v. Uruguay*, decision of 3 April 1980, *ibid.* p. 111, at p. 119, para. 17; *Dermitt Barbato v. Uruguay*, decision of 21 October 1982, A/38/40, p. 133, para. 11.

Article 31

Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Commentary

(1) The obligation to make full reparation is the second general obligation of the responsible State consequent upon the commission of an internationally wrongful act. The general principle of the consequences of the commission of an internationally wrongful act was stated by the Permanent Court in the *Factory at Chorzów* case:

“It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.”⁴⁷⁷

In this passage, which has been cited and applied on many occasions,⁴⁷⁸ the Court was using the term “reparation” in its most general sense. It was rejecting a Polish argument that jurisdiction to interpret and apply a treaty did not entail jurisdiction to deal with disputes over the form and quantum of reparation to be made. By that stage of the dispute, Germany was no longer seeking for its national the return of the factory in question or of the property seized with it.

(2) In a subsequent phase of the same case, the Court went on to specify in more detail the content of the obligation of reparation. It said:

“The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all

⁴⁷⁷ *Factory at Chorzów*, Jurisdiction, 1927, P.C.I.J., Series A, No. 9, p. 21.

⁴⁷⁸ Cf. the International Court’s reference to this decision in *LaGrand (Germany v. United States of America)*, *Merits*, judgment of 27 June 2001, para. 48.

probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”⁴⁷⁹

In the first sentence, the Court gave a general definition of reparation, emphasizing that its function was the re-establishment of the situation affected by the breach.⁴⁸⁰ In the second sentence it dealt with that aspect of reparation encompassed by “compensation” for an unlawful act - that is, restitution or its value, and in addition damages for loss sustained as a result of the wrongful act.

(3) The obligation placed on the responsible State by article 31 is to make “full reparation” in the *Factory at Chorzów* sense. In other words, the responsible State must endeavour to “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”⁴⁸¹ through the provision of one or more of the forms of reparation set out in chapter II of this Part.

(4) The general obligation of reparation is formulated in article 31 as the immediate corollary of a State’s responsibility, i.e., as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States. This formulation avoids the difficulties that might arise where the same obligation is owed simultaneously to several, many or all States, only a few of which are specially affected by the breach. But quite apart from the questions raised when there is more than one State entitled to invoke responsibility,⁴⁸² the general obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any State, even if the form which reparation should take in the circumstances may depend on the response of the injured State or States.

⁴⁷⁹ *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17*, p. 47.

⁴⁸⁰ Cf. P-M. Dupuy, “Le fait générateur de la responsabilité internationale des États”, *Recueil des cours*, vol. 188 (1984-V), p. 9, at p. 94, who uses the term “restauration”.

⁴⁸¹ *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17*, p. 47.

⁴⁸² For the States entitled to invoke responsibility see articles 42 and 48 and commentaries. For the situation where there is a plurality of injured States see article 46 and commentary.

(5) The responsible State's obligation to make full reparation relates to the "injury caused by the internationally wrongful act". The notion of "injury", defined in paragraph 2, is to be understood as including any damage caused by that act. In particular, in accordance with paragraph 2, "injury" includes any material or moral damage caused thereby. This formulation is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, excluding merely abstract concerns or general interests of a State which is individually unaffected by the breach.⁴⁸³ "Material" damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. "Moral" damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life. Questions of reparation for such forms of damage are dealt with in more detail in chapter II of this Part.⁴⁸⁴

(6) The question whether damage to a protected interest is a necessary element of an internationally wrongful act has already been discussed.⁴⁸⁵ There is in general no such requirement; rather this is a matter which is determined by the relevant primary rule. In some cases, the gist of a wrong is the causing of actual harm to another State. In some cases what matters is the failure to take necessary precautions to prevent harm even if in the event no harm occurs. In some cases there is an outright commitment to perform a specified act, e.g. to incorporate uniform rules into internal law. In each case the primary obligation will determine what is required. Hence article 12 defines a breach of an international obligation as a failure to conform with an obligation.

⁴⁸³ Although not individually injured, such States may be entitled to invoke responsibility in respect of breaches of certain classes of obligation in the general interest, pursuant to article 48. Generally on notions of injury and damage see B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973); B. Graefrath, "Responsibility and damage caused: relations between responsibility and damages", *Recueil des cours*, vol. 185 (1984-II), p. 95; A. Tanzi, "Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?", in M. Spinedi & B. Simma (eds), *United Nations Codification of State Responsibility* (New York, Oceana, 1987) p. 1; I. Brownlie, *System of the Law of Nations: State Responsibility (Part I)* (Oxford, Clarendon Press, 1983), pp. 53-88.

⁴⁸⁴ See especially article 36 and commentary.

⁴⁸⁵ See commentary to article 2, para. (9).

(7) As a corollary there is no general requirement, over and above any requirements laid down by the relevant primary obligation, that a State should have suffered material harm or damage before it can seek reparation for a breach. The existence of actual damage will be highly relevant to the form and quantum of reparation. But there is no general requirement of material harm or damage for a State to be entitled to seek some form of reparation. In the *Rainbow Warrior* arbitration it was initially argued that “in the theory of international responsibility, damage is necessary to provide a basis for liability to make reparation”, but the parties subsequently agreed that ...

“[u]nlawful action against non-material interests, such as acts affecting the honour, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State.”⁴⁸⁶

The Tribunal held that the breach by France had “provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage... of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well”.⁴⁸⁷

(8) Where two States have agreed to engage in particular conduct, the failure by one State to perform the obligation necessarily concerns the other. A promise has been broken and the right of the other State to performance correspondingly infringed. For the secondary rules of State responsibility to intervene at this stage and to prescribe that there is no responsibility because no identifiable harm or damage has occurred would be unwarranted. If the parties had wished to commit themselves to that formulation of the obligation they could have done so. In many cases the damage that may follow from a breach (e.g. harm to a fishery from fishing in the closed season, harm to the environment by emissions exceeding the prescribed limit, abstraction from a river of more than the permitted amount) may be distant, contingent or uncertain. Nonetheless States may enter into immediate and unconditional commitments in their mutual long-term interest in such fields. Accordingly article 31 defines “injury” in a broad and inclusive way, leaving it to the primary obligations to specify what is required in each case.

⁴⁸⁶ *Rainbow Warrior (New Zealand/France)*, UNRIIAA, vol. XX, p. 217 (1990), at p. 267, para. 109.

⁴⁸⁷ *Ibid.*, at p. 267, para. 110.

(9) Paragraph 2 addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury. It is only “[i]njury ... caused by the internationally wrongful act of a State” for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.

(10) The allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses “attributable [to the wrongful act] as a proximate cause”,⁴⁸⁸ or to damage which is “too indirect, remote, and uncertain to be appraised”,⁴⁸⁹ or to “any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of” the wrongful act.⁴⁹⁰ Thus causality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too “remote” or “consequential” to be the subject of reparation. In some cases, the criterion of “directness” may

⁴⁸⁸ See United States-Germany Mixed Claims Commission, *Administrative Decision No. II*, *UNRIAA*, vol. VII, p. 23 (1923), at p. 30. See also *Dix*, *ibid*, vol. IX, p. 119 (1902), at p. 121, and the Canadian statement of claim following the disintegration of the *Cosmos 954* Soviet nuclear-powered satellite over its territory in 1978: *I.L.M.*, vol. 18 (1979), p. 907, para. 23.

⁴⁸⁹ See the *Trail Smelter* arbitration, *UNRIAA*, vol. III, p. 1905 (1938, 1941), at p. 1931. See also A. Hauriou, “Les dommages indirects dans les arbitrages internationaux”, *R.G.D.I.P.*, vol. 31 (1924), p. 209 citing the “*Alabama*” arbitration as the most striking application of the rule excluding “indirect” damage.

⁴⁹⁰ Security Council resolution 687 (1991), para. 16. This was a chapter VII resolution, but it is expressed to reflect Iraq’s liability “under international law ... as a result of its unlawful invasion and occupation of Kuwait”. The United Nations Compensation Commission and the Governing Council have provided some guidance on the interpretation of the requirements of directness and causation under para. 16. See e.g. *Claims Against Iraq (Category “B” Claims)*, Report of 14 April 1994 (S/AC.26/1994/1), reproduced in *I.L.R.*, vol. 109, p. 127; approved by Governing Council Decision 20, 26 May 1994 (S/AC.26/Dec.20), reproduced in *I.L.R.*, vol. 109, p. 622; *Well Blowout Control Claim*, Report of 15 November 1996 (S/AC.26/1996/5), reproduced in *I.L.R.*, vol. 109, p. 480, at pp. 506-511, paras. 66-86; approved by Governing Council Decision 40, 17 December 1996 (S/AC.26/Dec.40), reproduced in *I.L.R.*, vol. 109, p. 669.

be used,⁴⁹¹ in others “foreseeability”⁴⁹² or “proximity”.⁴⁹³ But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.⁴⁹⁴ In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage “is not a part of the law which can be satisfactorily solved by search for a single verbal formula”.⁴⁹⁵ The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.

(11) A further element affecting the scope of reparation is the question of mitigation of damage. Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a “duty to mitigate”, this is

⁴⁹¹ As in Security Council resolution 687 (1991), para. 16.

⁴⁹² See, e.g., the “*Naulilaa*” case (*Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa*) (*Portugal v. Germany*), *UNRIIAA*, vol. II, p. 1011 (1928), at p. 1031.

⁴⁹³ For comparative reviews of issues of causation and remoteness see, e.g. H.L.A. Hart & A. M. Honoré, *Causation in the Law* (2nd ed.) (Oxford, Clarendon Press, 1985); A. M. Honoré, “Causation and Remoteness of Damage”, A. Tunc, ed. In *International Encyclopedia of Comparative Law* vol. XI, Part 1, chap. VII, 156 p.; K. Zweigert and H. Kötz, *Introduction to Comparative Law* (3rd ed) (trans. J.A. Weir) (Oxford, Clarendon Press, 1998), pp. 601-627 (esp. p. 609ff.); B. S. Markesinis, *The German Law of Obligations. Volume II. The Law of Torts: A Comparative Introduction* (Oxford, Clarendon Press, 3rd ed., 1997), pp. 95-108, with many references to the literature.

⁴⁹⁴ See e.g. the decision of the Iran-United States Claims Tribunal in *Islamic Republic of Iran v. United States of America*, *Cases Nos. A15 (IV) and A24*, Award No. 590-A15 (IV)/A24-FT, 28 December 1998.

⁴⁹⁵ P. S. Atiyah, *An Introduction to the Law of Contract* (5th ed.) (Oxford, Clarendon Press, 1995), p. 466.

not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.⁴⁹⁶ The point was clearly made in this sense by the International Court in the *Gabčíkovo-Nagymaros Project* case:

“Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that ‘It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained.’ It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided.

While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.”⁴⁹⁷

(12) Often two separate factors combine to cause damage. In the *Diplomatic and Consular Staff* case,⁴⁹⁸ the initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students’ own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy. In the *Corfu Channel* case,⁴⁹⁹ the damage to the British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international

⁴⁹⁶ In the *Well Blowout Control Claim*, a Panel of the United Nations Compensation Commission noted that “under the general principles of international law relating to mitigation of damages ... the Claimant was not only permitted but indeed obligated to take reasonable steps to ... mitigate the loss, damage or injury being caused”: Report of 15 November 1996 (S/AC.26/1994/5), reproduced in *I.L.R.*, vol. 109, p. 480, at pp. 502-503, para. 54.

⁴⁹⁷ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports* 1997, p. 7, at p. 55, para. 80.

⁴⁹⁸ *United States Diplomatic and Consular Staff in Tehran*, *I.C.J. Reports* 1980, p. 3, at pp. 29-32.

⁴⁹⁹ *Corfu Channel, Merits*, *I.C.J. Reports* 1949, p. 4, at pp. 17-18, 22-23.

practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes,⁵⁰⁰ except in cases of contributory fault.⁵⁰¹ In the *Corfu Channel* case, for example, the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of the mines even though Albania had not itself laid the mines.⁵⁰² Such a result should follow a fortiori in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood. In the *Diplomatic and Consular Staff* case the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them.⁵⁰³

(13) It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful

⁵⁰⁰ This approach is consistent with the way in which these issues are generally dealt with in national law. "It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause ... In other words, the liability of a tortfeasor is not affected vis-à-vis the victim by the consideration that another is concurrently liable": J.A. Weir, "Complex Liabilities", in A. Tunc, (ed.), *International Encyclopedia of Comparative Law* (Tübingen, Mohr, 1983), vol. XI, p. 41. The United States relied on this comparative law experience in its pleadings in the *Aerial Incident Cases* (*United States of America v. Bulgaria*) when it said, referring to articles 38 (1) (c) and (d) of the Statute, that "in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage". Memorial of 2 December 1958, in *I.C.J. Pleadings, Aerial Incident of 27 July 1955*, at p. 229.

⁵⁰¹ See article 39 and commentary.

⁵⁰² See *Corfu Channel (Assessment of the Amount of Compensation)*, *I.C.J. Reports* 1949, p. 244, at p. 250.

⁵⁰³ *I.C.J. Reports*, 1980, p. 3 at pp. 31-33.

conduct. Indeed, in the *Zafiro* claim the tribunal went further and in effect placed the onus on the responsible State to show what proportion of the damage was *not* attributable to its conduct. It said:

“We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers cannot be identified, we are constrained to hold the United States liable for the whole. In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.”⁵⁰⁴

(14) Concerns are sometimes expressed that a general principle of reparation of all loss flowing from a breach might lead to reparation which is out of all proportion to the gravity of the breach. However the notion of “proportionality” applies differently to the different forms of reparation.⁵⁰⁵ It is addressed, as appropriate, in the individual articles in chapter II dealing with the forms of reparation.

Article 32

Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Commentary

(1) Article 3 concerns the role of internal law in the characterization of an act as wrongful. Article 32 makes clear the irrelevance of a State’s internal law to compliance with the obligations of cessation and reparation. It provides that a State which has committed an internationally wrongful act may not invoke its internal law as a justification for failure to comply with its obligations under this Part. Between them, articles 3 and 32 give effect for the

⁵⁰⁴ “*The Zafiro*”, *UNRIAA*, vol. VI, p. 160 (1925), at pp. 164-165.

⁵⁰⁵ See articles 35 (b), 37 (3), 39 and commentaries thereto.

purposes of State responsibility to the general principle that a State may not rely on its internal law as a justification for its failure to comply with its international obligations.⁵⁰⁶ Although practical difficulties may arise for a State organ confronted with an obstacle to compliance posed by the rules of the internal legal system under which it is bound to operate, the State is not entitled to oppose its internal law or practice as a legal barrier to the fulfilment of an international obligation arising under Part Two.

(2) Article 32 is modelled on article 27 of the 1969 Vienna Convention on the Law of Treaties,⁵⁰⁷ which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This general principle is equally applicable to the international obligations deriving from the rules of State responsibility set out in Part Two. The principle may be qualified by the relevant primary rule, or by a *lex specialis*, such as article 41 of the European Convention on Human Rights, which provides for just satisfaction in lieu of full reparation “if the internal law of the said Party allows only partial reparation to be made”.⁵⁰⁸

(3) The principle that a responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations arising out of the commission of an internationally wrongful act is supported both by State practice and international decisions. For example the dispute between Japan and the United States in 1906 over California’s discriminatory education policies was resolved by the revision of the Californian legislation.⁵⁰⁹ In the incident concerning article 61 (2) of the Weimar Constitution, a constitutional amendment was provided for in order to ensure the discharge of the obligation deriving from article 80 of the Treaty of Versailles.⁵¹⁰ In the *Peter Pázmány University* case the Permanent Court specified that

⁵⁰⁶ See commentary to article 3, paras. (2)-(4).

⁵⁰⁷ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

⁵⁰⁸ United Nations, *Treaty Series*, vol. 213, p. 221, as renumbered by the Eleventh Protocol, 1994. Other examples include art. 32 of the Revised General Act for the Pacific Settlement of Disputes of 23 April 1949, United Nations, *Treaty Series*, vol. 72, p. 101, and art. 30 of the 1957 European Convention for the Peaceful Settlement of Disputes, United Nations, *Treaty Series*, vol. 320, p. 243.

⁵⁰⁹ See R.L. Buell “The development of the anti-Japanese agitation in the United States”, *Political Science Quarterly*, vol. 37 (1922), 620.

⁵¹⁰ *British and Foreign State Papers*, vol. 112, p. 1094.

the property to be returned should be “freed from any measure of transfer, compulsory administration, or sequestration”.⁵¹¹ In short, international law does not recognize that the obligations of a responsible State under Part Two are subject to the State’s internal legal system nor does it allow internal law to count as an excuse for non-performance of the obligations of cessation and reparation.

Article 33

Scope of international obligations set out in this Part

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

Commentary

- (1) Article 33 concludes the provisions of chapter I of Part Two by clarifying the scope and effect of the international obligations covered by the Part. In particular paragraph 1 makes it clear that identifying the State or States towards which the responsible State’s obligations in Part Two exist depends both on the primary rule establishing the obligation that was breached and on the circumstances of the breach. For example, pollution of the sea, if it is massive and widespread, may affect the international community as a whole or the coastal States of a region; in other circumstances it might only affect a single neighbouring State. Evidently the gravity of the breach may also affect the scope of the obligations of cessation and reparation.
- (2) In accordance with paragraph 1, the responsible State’s obligations in a given case may exist towards another State, several States or the international community as a whole. The reference to several States includes the case in which a breach affects all the other parties to a treaty or to a legal regime established under customary international law. For instance, when an obligation can be defined as an “integral” obligation, the breach by a State necessarily affects all the other parties to the treaty.⁵¹²

⁵¹¹ *Appeal from a judgement of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University)*, 1933, *P.C.I.J.*, *Series A/B*, No. 61, p. 208, at p. 249.

⁵¹² See further article 42 (b) (ii) and commentary.

- (3) When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights. Individual rights under international law may also arise outside the framework of human rights.⁵¹³ The range of possibilities is demonstrated from the judgment of the International Court in the *LaGrand* case,⁵¹⁴ where the Court held that article 36 of the Vienna Convention on Consular Relations "creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person".⁵¹⁵
- (4) Such possibilities underlie the need for paragraph 2 of article 33. Part Two deals with the secondary obligations of States in relation to cessation and reparation, and those obligations may be owed, *inter alia*, to one or several States or to the international community as a whole. In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected. It is also true in the case of rights under bilateral or regional investment protection agreements. Part Three is concerned with the invocation of responsibility by other States, whether they are to be considered "injured States" under article 42, or other interested States under article 48, or whether they may be exercising specific rights to invoke responsibility under some special rule (cf. article 55). The Articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than

⁵¹³ Cf. *Jurisdiction of the Courts of Danzig, 1928, P.C.I.J., Series B, No. 15*, pp. 17-21.

⁵¹⁴ *LaGrand (Germany v. United States of America), Merits*, judgment of 27 June 2001.

⁵¹⁵ *Ibid.*, para. 77. In the circumstances the Court did not find it necessary to decide whether the individual rights had "assumed the character of a human right": *ibid.*, para. 78.

States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase “which may accrue directly to any person or entity other than a State”.

Chapter II

Reparation for injury

Chapter II deals with the forms of reparation for injury, spelling out in further detail the general principle stated in article 31, and in particular seeking to establish more clearly the relations between the different forms of reparation, viz., restitution, compensation and satisfaction, as well as the role of interest and the question of taking into account any contribution to the injury which may have been made by the victim.

Article 34

Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Commentary

(1) Article 34 introduces chapter II by setting out the forms of reparation which separately or in combination will discharge the obligation to make full reparation for the injury caused by the internationally wrongful act. Since the notion of “injury” and the necessary causal link between the wrongful act and the injury are defined in the statement of the general obligation to make full reparation in article 31,⁵¹⁶ article 34 need do no more than refer to “[f]ull reparation for the injury caused”.

(2) In the *Factory at Chorzów* case, the injury was a material one and the Permanent Court dealt only with two forms of reparation, restitution and compensation.⁵¹⁷ In certain cases, satisfaction may be called for as an additional form of reparation. Thus full reparation may take the form of restitution, compensation and satisfaction, as required by the circumstances. Article 34 also makes it clear that full reparation may only be achieved in particular cases by the combination of different forms of reparation. For example, re-establishment of the situation

⁵¹⁶ See commentary to article 31, paras. (4)-(14).

⁵¹⁷ *Factory at Chorzów, Merits, 1928, P.C.I.J. Series A, No. 17, p. 47.*

which existed before the breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (e.g., injury flowing from the loss of the use of property wrongfully seized). Wiping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused.

(3) The primary obligation breached may also play an important role with respect to the form and extent of reparation. In particular, in cases of restitution not involving the return of persons, property or territory of the injured State, the notion of reverting to the *status quo ante* has to be applied having regard to the respective rights and competences of the States concerned. This may be the case, for example, where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed.⁵¹⁸

(4) The provision of each of the forms of reparation described in article 34 is subject to the conditions laid down in the articles which follow it in chapter II. This limitation is indicated by the phrase “in accordance with the provisions of this chapter”. It may also be affected by any valid election that may be made by the injured State as between different forms of reparation. For example, in most circumstances the injured State is entitled to elect to receive compensation rather than restitution. This element of choice is reflected in article 43.

(5) Concerns have sometimes been expressed that the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible State is concerned. The issue is whether the principle of proportionality should be articulated as an aspect of the obligation to make full reparation. In these Articles, proportionality is addressed in the context of each form of reparation, taking into account its specific character. Thus restitution is excluded if it would involve a burden out of all proportion to the benefit gained by the injured State or other party.⁵¹⁹ Compensation is limited to damage actually suffered as a result of the

⁵¹⁸ Thus in the *LaGrand* case, the Court indicated that a breach of the notification requirement in art. 36 of the Vienna Convention on Consular Relations, United Nations, *Treaty Series*, vol. 596, p. 261, leading to a severe penalty or prolonged detention, would require reconsideration of the fairness of the conviction “by taking account of the violation of the rights set forth in the Convention”: *LaGrand (Germany v. United States of America)*, *Merits*, judgment of 27 June 2001, para. 125. This would be a form of restitution which took into account the limited character of the rights in issue.

⁵¹⁹ See article 35 (b) and commentary.

internationally wrongful act, and excludes damage which is indirect or remote.⁵²⁰ Satisfaction must “not be out of proportion to the injury”.⁵²¹ Thus each of the forms of reparation takes such considerations into account.

(6) The forms of reparation dealt with in chapter II represent ways of giving effect to the underlying obligation of reparation set out in article 31. There are not, as it were, separate secondary obligations of restitution, compensation and satisfaction. Some flexibility is shown in practice in terms of the appropriateness of requiring one form of reparation rather than another, subject to the requirement of full reparation for the breach in accordance with article 31.⁵²² To the extent that one form of reparation is dispensed with or is unavailable in the circumstances, others, especially compensation, will be correspondingly more important.

Article 35

Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) Is not materially impossible;

(b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Commentary

(1) In accordance with article 34, restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act. Restitution involves the re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act, to the extent that any changes that have occurred in that situation may be traced to

⁵²⁰ See article 31 and commentary.

⁵²¹ See article 37 (3) and commentary.

⁵²² E.g., *Mélanie Lachenal*, *UNRIAA*, vol. XIII, p. 116 (1954), at pp. 130-131, where compensation was accepted in lieu of restitution originally decided upon, the Franco-Italian Conciliation Commission having agreed that restitution would require difficult internal procedures. See also commentary to article 35, para. (4).

that act. In its simplest form, this involves such conduct as the release of persons wrongly detained or the return of property wrongly seized. In other cases, restitution may be a more complex act.

(2) The concept of restitution is not uniformly defined. According to one definition, restitution consists in re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act. Under another definition, restitution is the establishment or re-establishment of the situation that would have existed if the wrongful act had not been committed. The former definition is the narrower one; it does not extend to the compensation which may be due to the injured party for loss suffered, for example for loss of the use of goods wrongfully detained but subsequently returned. The latter definition absorbs into the concept of restitution other elements of full reparation and tends to conflate restitution as a form of reparation and the underlying obligation of reparation itself. Article 35 adopts the narrower definition which has the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed. Restitution in this narrow sense may of course have to be completed by compensation in order to ensure full reparation for the damage caused, as article 36 makes clear.

(3) Nonetheless, because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by the Permanent Court in the *Factory at Chorzów* case when it said that the responsible State was under “the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible”.⁵²³ The Court went on to add that “[t]he impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution”.⁵²⁴ It can be seen in

⁵²³ *Factory at Chorzów, Merits, 1928, P.C.I.J. Series A, No. 17*, p. 48.

⁵²⁴ *Ibid.*

operation in the cases where tribunals have considered compensation only after concluding that, for one reason or another, restitution could not be effected.⁵²⁵ Despite the difficulties restitution may encounter in practice, States have often insisted upon claiming it in preference to compensation. Indeed in certain cases, especially those involving the application of peremptory norms, restitution may be required as an aspect of compliance with the primary obligation.

(4) On the other hand there are often situations where restitution is not available or where its value to the injured State is so reduced that other forms of reparation take priority. Questions of election as between different forms of reparation are dealt with in the context of Part Three.⁵²⁶ But quite apart from valid election by the injured State or other entity, the possibility of restitution may be practically excluded, e.g. because the property in question has been destroyed or fundamentally changed in character or the situation cannot be restored to the *status quo ante* for some reason. Indeed in some cases tribunals have inferred from the terms of the *compromis* or the positions of the parties what amounts to a discretion to award compensation rather than restitution. For example, in the *Walter Fletcher Smith* case, the arbitrator, while maintaining that restitution should be appropriate in principle, interpreted the *compromis* as giving him a discretion to award compensation and did so in “the best interests of the parties, and of the public”.⁵²⁷ In the *Aminoil* arbitration, the parties agreed that restoration of the *status quo ante* following the annulment of the concession by the Kuwaiti decree would be impracticable.⁵²⁸

⁵²⁵ See, e.g., *British Claims in the Spanish Zone of Morocco*, *UNRIAA*, vol. II, p. 615 (1925), at pp. 621-625, 651-742; *Religious Property Expropriated by Portugal*, *ibid.*, vol. I, p. 7 (1920); *Walter Fletcher Smith*, *ibid.*, vol. II, p. 913 (1927), at p. 918; *Heirs of Lebas de Courmont*, *ibid.*, vol. XIII, p. 761 (1957), at p. 764.

⁵²⁶ See articles 43, 45 and commentaries.

⁵²⁷ *UNRIAA*, vol. II, p. 915 (1929), at p. 918. In the *Greek Telephone Company* case, the arbitral tribunal, while ordering restitution, asserted that the responsible State could provide compensation instead for “important State reasons”. See J.G. Welter and S.M. Schwebel, “Some little known cases on concessions”, *B.Y.I.L.*, vol. 40 (1964), p. 216, at p. 221.

⁵²⁸ *Government of Kuwait v. American Independent Oil Company*, (1982) *I.L.R.*, vol. 66, p. 529, at p. 533.

(5) Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them. Examples of material restitution include the release of detained individuals, the handing over to a State of an individual arrested in its territory,⁵²⁹ the restitution of ships,⁵³⁰ or other types of property⁵³¹ including documents, works of art, share certificates, etc.⁵³² The term “juridical restitution” is sometimes used where restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law,⁵³³ the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner⁵³⁴ or a requirement that steps be taken (to the extent allowed by international law) for the termination of a treaty.⁵³⁵ In some cases, both material and juridical restitution may be

⁵²⁹ Examples of material restitution involving persons include the “*Trent*” (1861) and “*Florida*” (1864) incidents, both involving the arrest of individuals on board ships: Moore, *Digest*, vol. VII, pp. 768, 1090-1091), and the *Diplomatic and Consular Staff* case in which the International Court ordered Iran to immediately release every detained United States national: *Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at pp. 44-45.

⁵³⁰ See e.g. the “*Giaffarieh*” incident (1886) which originated in the capture in the Red Sea by an Egyptian warship of four merchant ships from Massawa under Italian registry: Società Italiana per l’Organizzazione Internazionale, Consiglio Nazionale delle Ricerche, *La prassi italiana di diritto internazionale*, 1st series (Dobbs Ferry, Oceana, 1970), vol. II, pp. 901-902.

⁵³¹ E.g., *Temple of Preah Vihear, Merits, I.C.J. Reports 1962*, p. 6, at pp. 36-37, where the International Court decided in favour of a Cambodian claim which included restitution of certain objects removed from the area and the temple by Thai authorities. See also the *Hôtel Métropole* case, *UNRIAA*, vol. XIII, p. 219 (1950), the *Ottoz* case, *ibid.*, vol. XIII, p. 240 (1950), the *Hénon* case, *ibid.*, vol. XIII, p. 249 (1951).

⁵³² In the *Buzau-Nehoiasi Railway* case, an arbitral tribunal provided for the restitution to a German company of shares in a Romanian railway company: *UNRIAA*, vol. III, p. 1839 (1939).

⁵³³ For cases where the existence of a law itself amounts to a breach of an international obligation see commentary to article 12, para. (12).

⁵³⁴ E.g., the *Martini* case, *UNRIAA*, vol. II, p. 973 (1930).

⁵³⁵ In the *Bryan-Chamorro Treaty* case (*Costa Rica v. Nicaragua*), the Central American Court of Justice decided that “the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to re-establish and maintain the

involved.⁵³⁶ In others, an international court or tribunal can, by determining the legal position with binding force for the parties, award what amounts to restitution under another form.⁵³⁷ The term “restitution” in article 35 thus has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act.

(6) What may be required in terms of restitution will often depend on the content of the primary obligation which has been breached. Restitution, as the first of the forms of reparation, is of particular importance where the obligation breached is of a continuing character, and even more so where it arises under a peremptory norm of general international law. In the case, for example, of unlawful annexation of a State, the withdrawal of the occupying State’s forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution.⁵³⁸ Even so, ancillary measures (the return of persons or property seized in the course of the invasion) will be required as an aspect either of cessation or restitution.

legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics in so far as relates to matters considered in this action...” *A.J.I.L.*, vol. 11 (1917), p. 674, at p. 696; See also p. 683.

⁵³⁶ Thus the Permanent Court held that Czechoslovakia was “bound to restore to the Royal Hungarian Peter Pázmány University of Budapest the immovable property claimed by it, freed from any measure of transfer, compulsory administration, or sequestration, and in the condition in which it was before the application of the measures in question”: *Appeal from a judgement of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University)*, 1933, *P.C.I.J.*, Series A/B, No. 61, p. 208, at p. 249.

⁵³⁷ In the *Legal Status of Eastern Greenland* case, the Permanent Court decided “that the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid.”: 1933, *P.C.I.J.*, Series A/B, No. 53, p. 22, at p. 75. In *Free Zones of Upper Savoy and the District of Gex* the Permanent Court decided that France “must withdraw its customs line in accordance with the provisions of the said treaties and instruments; and that this regime must continue in force so long as it has not been modified by agreement between the Parties”: 1932, *P.C.I.J.*, Series A/B, No. 46, p. 96, at p. 172. See also F.A. Mann, “The consequences of an international wrong in international and municipal law”, *B.Y.I.L.*, vol. 48 (1976-77), p. 1 at pp. 5-8.

⁵³⁸ See above, commentary to article 30, para. (8).

(7) The obligation to make restitution is not unlimited. In particular, under article 35 restitution is required “provided and to the extent that” it is neither materially impossible nor wholly disproportionate. The phrase “provided and to the extent that” makes it clear that restitution may be only partially excluded, in which case the responsible State will be obliged to make restitution to the extent that this is neither impossible nor disproportionate.

(8) Under article 35 (a), restitution is not required if it is “materially impossible”. This would apply where property to be restored has been permanently lost or destroyed, or has deteriorated to such an extent as to be valueless. On the other hand, restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these. Under article 32 the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation, and the mere fact of political or administrative obstacles to restitution do not amount to impossibility.

(9) Material impossibility is not limited to cases where the object in question has been destroyed, but can cover more complex situations. In the *Forests of Central Rhodope* case, the claimant was entitled to only a share in the forestry operations and no claims had been brought by the other participants. The forests were not in the same condition as at the time of their wrongful taking, and detailed inquiries would be necessary to determine their condition. Since the taking, third parties had acquired rights to them. For a combination of these reasons, restitution was denied.⁵³⁹ The case supports a broad understanding of the impossibility of granting restitution, but it concerned questions of property rights within the legal system of the responsible State.⁵⁴⁰ The position may be different where the rights and obligations in issue arise directly on the international plane. In that context restitution plays a particularly important role.

⁵³⁹ *UNRIAA*, vol. III, p. 1405 (1933), at p. 1432.

⁵⁴⁰ For questions of restitution in the context of State contract arbitration see *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Government of the Libyan Arab Republic*, (1977) *I.L.R.*, vol. 53, p. 389, at pp. 507-8, para. 109; *BP Exploration Company (Libya) Ltd. v. Government of the Libyan Arab Republic*, (1974) *I.L.R.*, vol. 53, p. 297, at p. 354; *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, (1977) *I.L.R.*, vol. 62, p. 140, at p. 200.

(10) In certain cases, the position of third parties may have to be taken into account in considering whether restitution is materially possible. This was true in the *Forests of Central Rhodope* case.⁵⁴¹ But whether the position of a third party will preclude restitution will depend on the circumstances, including whether the third party at the time of entering into the transaction or assuming the disputed rights was acting in good faith and without notice of the claim to restitution.

(11) A second exception, dealt with in article 35 (b), involves those cases where the benefit to be gained from restitution is wholly disproportionate to its cost to the responsible State. Specifically, restitution may not be required if it would “involve a burden out of all proportion to the benefit deriving from restitution instead of compensation”. This applies only where there is a grave disproportionality between the burden which restitution would impose on the responsible State and the benefit which would be gained, either by the injured State or by any victim of the breach. It is thus based on considerations of equity and reasonableness,⁵⁴² although with a preference for the position of the injured State in any case where the balancing process does not indicate a clear preference for compensation as compared with restitution. The balance will invariably favour the injured State in any case where the failure to provide restitution would jeopardize its political independence or economic stability.

Article 36

Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

⁵⁴¹ *UNRIIAA*, vol. III, p. 1405 (1933), at p. 1432.

⁵⁴² See, e.g., J.H.W. Verzijl, *International Law in Historical Perspective* (Leyden, Sijthoff, 1973), part VI, p. 744, and the position taken by the Deutsche Gesellschaft für Völkerrecht, in *Yearbook ... 1969*, vol. II, p. 155.

Commentary

(1) Article 36 deals with compensation for damage caused by an internationally wrongful act, to the extent that such damage is not made good by restitution. The notion of “damage” is defined inclusively in article 31 (2) as any damage whether material or moral.⁵⁴³ Article 36 (2) develops this definition by specifying that compensation shall cover any financially assessable damage including loss of profits so far as this is established in the given case. The qualification “financially assessable” is intended to exclude compensation for what is sometimes referred to as “moral damage” to a State, i.e., the affront or injury caused by a violation of rights not associated with actual damage to property or persons: this is the subject matter of satisfaction, dealt with in article 37.

(2) Of the various forms of reparation, compensation is perhaps the most commonly sought in international practice. In the *Gabčíkovo-Nagymaros Project* case, the Court declared: “[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it”.⁵⁴⁴ It is equally well-established that an international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered.⁵⁴⁵

(3) The relationship with restitution is clarified by the final phrase of article 36 (“insofar as such damage is not made good by restitution”). Restitution, despite its primacy as a matter of legal principle, is frequently unavailable or inadequate. It may be partially or entirely ruled out either on the basis of the exceptions expressed in article 35, or because the injured State prefers

⁵⁴³ See commentary to article 31, paras. (5), (6), (8).

⁵⁴⁴ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, at p. 81, para. 152. See also the statement by the Permanent Court of International Justice in the *Factory at Chorzów* case, declaring that it is “a principle of international law that the reparation of a wrong may consist in an indemnity”: *Factory at Chorzów, Merits*, 1928, P.C.I.J., Series A, No. 17, p. 27.

⁵⁴⁵ *Factory at Chorzów, Jurisdiction*, 1927, P.C.I.J., Series A, No. 9, p. 21; *Fisheries Jurisdiction*, (Federal Republic of Germany v. Iceland), Merits, I.C.J. Reports 1974, p. 175, at pp. 203-205, paras. 71-76; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, I.C.J. Reports 1986, p. 14, at p. 142.

compensation or for other reasons. Even where restitution is made, it may be insufficient to ensure full reparation. The role of compensation is to fill in any gaps so as to ensure full reparation for damage suffered.⁵⁴⁶ As the Umpire said in the “*Lusitania*” case:

“The fundamental concept of ‘damages’ is ... reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.”⁵⁴⁷

Likewise the role of compensation was articulated by the Permanent Court in the following terms:

“Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”⁵⁴⁸

Entitlement to compensation for such losses is supported by extensive case law, State practice and the writings of jurists.

(4) As compared with satisfaction, the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. In other words, the function of article 36 is purely compensatory, as its title indicates. Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary

⁵⁴⁶ *Factory at Chorzów, Merits*, 1928, *P.C.I.J., Series A, No. 17*, pp. 47-8.

⁵⁴⁷ *UNRIAA*, vol. VII, p. 32 (1923), at p. 39 (emphasis in original).

⁵⁴⁸ *Factory at Chorzów, Merits*, 1928, *P.C.I.J., Series A, No. 17*, p. 47, cited and applied *inter alia* by the International Tribunal for the Law of the Sea in *The M/V “Saiga” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, judgment of 1 July 1999, para. 170. See also *Papamichalopoulos v. Greece (Art. 50)*, *E.C.H.R., Series A, No. 330-B* (1995), at para. 36 (European Court of Human Rights); *Velásquez Rodríguez, Inter-Am.Ct.H.R., Series C, No. 4* (1989), at pp. 26-27, 30-31 (Inter-American Court of Human Rights); *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran and Others*, (1984) 6 *Iran-U.S.C.T.R.* 219, at p. 225.

character.⁵⁴⁹ Thus compensation generally consists of a monetary payment, though it may sometimes take the form, as agreed, of other forms of value. It is true that monetary payments may be called for by way of satisfaction under article 37, but they perform a function distinct from that of compensation. Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured State as a result of the breach. Satisfaction is concerned with non-material injury, specifically non-material injury to the State, on which a monetary value can be put only in a highly approximate and notional way.⁵⁵⁰

(5) Consistently with other provisions of Part Two, article 36 is expressed as an obligation of the responsible State to provide reparation for the consequences flowing from the commission of an internationally wrongful act.⁵⁵¹ The scope of this obligation is delimited by the phrase “any financially assessable damage”, that is, any damage which is capable of being evaluated in financial terms. Financially assessable damage encompasses both damage suffered by the State itself (to its property or personnel or in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from an internationally wrongful act) as well as damage suffered by nationals, whether persons or companies, on whose behalf the State is claiming within the framework of diplomatic protection.

⁵⁴⁹ In *Velásquez Rodríguez (Compensation)*, the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages: *Inter-Am. Ct.H.R., Series C, No. 7* (1989), p. 52. See also *Re Letelier and Moffit*, (1992) *I.L.R.*, vol. 88, p. 727 concerning the assassination in Washington by Chilean agents of a former Chilean Minister; the *compromis* excluded any award of punitive damages, despite their availability under United States law. On punitive damages see also N. Jørgensen, “A Reappraisal of Punitive Damages in International Law”, *B.Y.I.L.*, vol. 68 (1997), p. 247; S. Wittich, “Awe of the Gods and Fear of the Priests: Punitive Damages in the Law of State Responsibility”, *Austrian Review of International and European Law*, vol. 3 (1998), p. 31.

⁵⁵⁰ See commentary to article 37, para. (3).

⁵⁵¹ For the requirement of a sufficient causal link between the internationally wrongful act and the damage see commentary to article 31, paras. (11)-(13).

- (6) In addition to the International Court of Justice, international tribunals dealing with issues of compensation include the International Tribunal for the Law of the Sea,⁵⁵² the Iran-United States Claims Tribunal,⁵⁵³ human rights courts and other bodies,⁵⁵⁴ and I.C.S.I.D. tribunals under the Washington Convention of 1965.⁵⁵⁵ Other compensation claims have been settled by agreement, normally on a without prejudice basis, with the payment of substantial compensation a term of the agreement.⁵⁵⁶ The rules and principles developed by these bodies in assessing compensation can be seen as manifestations of the general principle stated in article 36.
- (7) As to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon the content of particular primary obligations, an evaluation of the respective behaviour of the parties and, more generally, a

⁵⁵² E.g., *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, judgment of 1 July 1999, paras. 170-177.

⁵⁵³ The Iran-United States Claims Tribunal has developed a substantial jurisprudence on questions of assessment of damage and the valuation of expropriated property. For reviews of the Tribunal's jurisprudence on these subjects see *inter alia*, G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), chs. 5, 6, 12; C.N. Brower and J.D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague, Nijhoff, 1998), chs. 14-18; M. Pellonpää, "Compensable Claims Before the Tribunal: Expropriation Claims", in R.B. Lillich & D.B. McGraw (eds.), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Irvington-on-Hudson, Transnational Publishers, 1998), pp. 185-266; D.P. Stewart, "Compensation and Valuation Issues", *ibid.*, pp. 325-385.

⁵⁵⁴ For a review of the practice of such bodies in awarding compensation see D. Shelton, *Remedies in International Human Rights Law* (Oxford, Oxford University Press, 1999), pp. 214-279.

⁵⁵⁵ I.C.S.I.D. Tribunals have jurisdiction to award damages or other remedies in cases concerning investments arising between States parties and nationals. Some of these claims involve direct recourse to international law as a basis of claim. See e.g. *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, (1990) 4 I.C.S.I.D. Reports 245.

⁵⁵⁶ See e.g. *Certain Phosphate Lands in Nauru*, I.C.J. Reports 1992 p. 240, and for the Court's order of discontinuance following the settlement, I.C.J. Reports 1993, p. 322; *Passage through the Great Belt (Finland v. Denmark)*, I.C.J. Reports 1992, p. 348 (order of discontinuance following settlement); *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, I.C.J. Reports 1996, p. 9 (order of discontinuance following settlement).

concern to reach an equitable and acceptable outcome.⁵⁵⁷ The following examples illustrate the types of damage that may be compensable and the methods of quantification that may be employed.

(8) Damage to the State as such might arise out of the shooting down of its aircraft or the sinking of its ships, attacks on its diplomatic premises and personnel, damage caused to other public property, the costs incurred in responding to pollution damage, or incidental damage arising, for example, out of the need to pay pensions and medical expenses for officials injured as the result of a wrongful act. Such a list cannot be comprehensive and the categories of compensable injuries suffered by States are not closed.

(9) In the *Corfu Channel* case, the United Kingdom sought compensation in respect of three heads of damage: replacement of the destroyer *Saumarez*, which became a total loss, the damage sustained by the destroyer *Volage*, and the damage resulting from the deaths and injuries of naval personnel. The Court entrusted the assessment to expert enquiry. In respect of the destroyer *Saumarez* the Court found that “the true measure of compensation” was “the replacement cost of the [destroyer] at the time of its loss” and held that the amount of compensation claimed by the United Kingdom Government (£700,087) was justified. For the damage to the destroyer *Volage*, the experts had reached a slightly lower figure than the £93,812 claimed by the United Kingdom, “explained by the necessarily approximate nature of the valuation, especially as regards stores and equipment”. In addition to the amounts awarded for the damage to the two destroyers, the Court upheld the United Kingdom’s claim for £50,048 representing “the cost of pensions and other grants made by it to victims or their dependants, and for costs of administration, medical treatment, etc.”⁵⁵⁸

⁵⁵⁷ Cf. G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), p. 242. See also B. Graefrath, “Responsibility and damages caused: relationship between responsibility and damages”, *Recueil des cours*, vol. 185 (1984-II), p. 95 at p. 101; L. Reitzer, *La réparation comme conséquence de l’acte illicite en droit international* (Paris, Sirey, 1938); C.D. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), pp. 33-34; J. Personnaz, *La réparation du préjudice en droit international public* (Paris, 1939); M. Iovane, *La riparazione nella teoria e nella prassi dell’illecito internazionale* (Giuffré, Milan, 1990).

⁵⁵⁸ *Corfu Channel case (Assessment of Compensation)*, *I.C.J. Reports* 1949 p. 244, at p. 249.

(10) In the *M/V “Saiga”* case, Saint Vincent and the Grenadines sought compensation from Guinea following the wrongful arrest and detention of a Saint Vincent and the Grenadines’ registered vessel, the *Saiga*, and its crew. The International Tribunal for the Law of the Sea awarded compensation of US\$ 2,123,357 with interest. The heads of damage compensated included, *inter alia*, damage to the vessel, including costs of repair, losses suffered with respect to charter hire of the vessel, costs related to the detention of the vessel, and damages for the detention of the captain, members of the crew and others on board the vessel. Saint Vincent and the Grenadines had claimed compensation for the violation of its rights in respect of ships flying its flag occasioned by the arrest and detention of the *Saiga*, however, the Tribunal considered that its declaration that Guinea acted wrongfully in arresting the vessel in the circumstances, and in using excessive force, constituted adequate reparation.⁵⁵⁹ Claims regarding the loss of registration revenue due to the illegal arrest of the vessel and for the expenses resulting from the time lost by officials in dealing with the arrest and detention of the ship and its crew were also unsuccessful. In respect of the former, the Tribunal held that Saint Vincent and the Grenadines failed to produce supporting evidence. In respect of the latter, the Tribunal considered that such expenses were not recoverable since they were incurred in the exercise of the normal functions of a flag State.⁵⁶⁰

(11) In a number of cases payments have been directly negotiated between injured and injuring States following wrongful attacks on ships causing damage or sinking of the vessel, and in some cases, loss of life and injury among the crew.⁵⁶¹ Similar payments have been negotiated

⁵⁵⁹ *The M/V “Saiga” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, judgment of 1 July 1999, para. 176.

⁵⁶⁰ *Ibid.*, para. 177.

⁵⁶¹ See the payment by Cuba to the Bahamas for the sinking by Cuban aircraft on the high seas of a Bahamian vessel, with loss of life among the crew (*R.G.D.I.P.*, vol. 85 (1981), p. 540), the payment of compensation by Israel for an attack in 1967 on the *U.S.S. Liberty*, with loss of life and injury among the crew (*R.G.D.I.P.*, vol. 85 (1981), p. 562) and the payment by Iraq of US\$ 27 million for the 37 deaths which occurred in May 1987 when Iraqi aircraft severely damaged the *U.S.S. Stark* (*A.J.I.L.*, vol. 83 (1989), p. 561).

where damage is caused to aircraft of a State, such as the “full and final settlement” agreed between Iran and the United States following a dispute over the destruction of an Iranian aircraft and the killing of its 290 passengers and crew.⁵⁶²

(12) Agreements for the payment of compensation are also frequently negotiated by States following attacks on diplomatic premises, whether in relation to damage to the embassy itself⁵⁶³ or injury to its personnel.⁵⁶⁴ Damage caused to other public property, such as roads and infrastructure, has also been the subject of compensation claims.⁵⁶⁵ In many cases these payments have been made on an ex gratia or without prejudice basis, without any admission of responsibility.⁵⁶⁶

(13) Another situation in which States may seek compensation for damage suffered by the State as such is where costs are incurred in responding to pollution damage. Following the crash of the Soviet Cosmos-954 satellite on Canadian territory in January 1978, Canada’s claim for compensation for expenses incurred in locating, recovering, removing and testing radioactive debris and cleaning up affected areas was based “jointly and separately on (a) the relevant

⁵⁶² *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, I.C.J. Reports 1996, p. 9 (order of discontinuance following settlement). For the settlement agreement itself, see the General Agreement between Iran and the United States on the Settlement of Certain I.C.J. and Tribunal Cases of 9 February 1996, made an Award on Agreed Terms by order of the Iran-United States Claims Tribunal, 22 February 1996: (1996) 32 *Iran-U.S.C.T.R.* 207, at p. 213.

⁵⁶³ See e.g. the Agreement of 1 December 1966 between the United Kingdom and Indonesia for the payment by the latter of compensation for, *inter alia*, damage to the British Embassy during mob violence (*United Kingdom Treaty Series*, No. 34 (1967)) and the payment by Pakistan to the United States of compensation for the sacking of the United States’ Embassy in Islamabad in 1979: *R.G.D.I.P.*, vol. 85 (1981), p. 880.

⁵⁶⁴ See e.g. Claim of Consul Henry R. Myers (*United States v. San Salvador*), [1890] *U.S. For. Rels.* pp. 64-65; [1892] *U.S. For. Rels.* pp. 24-43, 44, 49-51; [1893] *U.S. For. Rels.* pp. 174-179, 181-182, 184); Whiteman, *Damages*, vol. I, pp. 80-81.

⁵⁶⁵ For examples see Whiteman, *Damages*, vol. I, p. 81.

⁵⁶⁶ See e.g. United States-China agreement providing for an ex gratia payment of US\$ 4.5 million, to be given to the families of those killed and to those injured in the bombing of the Chinese Embassy in Belgrade on 7 May 1999, *A.J.I.L.*, vol. 94 (2000), p. 127.

international agreements... and (b) general principles of international law”.⁵⁶⁷ Canada asserted that it was applying “the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty”.⁵⁶⁸ The claim was eventually settled in April 1981 when the parties agreed on an ex gratia payment of Can. \$3 million (about 50 per cent of the amount claimed).⁵⁶⁹

(14) Compensation claims for pollution costs have been dealt with by the United Nations Compensation Commission in the context of assessing Iraq’s liability under international law “for any direct loss, damage - including environmental damage and the depletion of natural resources ... as a result of its unlawful invasion and occupation of Kuwait”.⁵⁷⁰ Decision 7 of the Governing Council of the Commission specifies various heads of damage encompassed by “environmental damage and the depletion of natural resources”.⁵⁷¹

(15) In cases where compensation has been awarded or agreed following an internationally wrongful act that causes or threatens environmental damage, payments have been directed to reimbursing the injured State for expenses reasonably incurred in preventing or remedying pollution, or to providing compensation for a reduction in the value of polluted property.⁵⁷²

⁵⁶⁷ Canada, Claim against the USSR for Damage Caused by Soviet Cosmos 954, 23 January 1979, *I.L.M.* vol. 18 (1979), p. 899, at p. 905.

⁵⁶⁸ *Ibid.*, at p. 906.

⁵⁶⁹ Protocol between Canada and the USSR, 2 April 1981, *I.L.M.*, vol. 20 (1981), 689.

⁵⁷⁰ S.C. Res. 687 (1991), para. 16.

⁵⁷¹ Decision 7 of 17 March 1992, *Criteria for Additional Categories of Claims*, S/AC.26/1991/7/Rev.1.

⁵⁷² See the decision of the arbitral tribunal in the *Trail Smelter Arbitration*, *UNRIAA*, vol. III, p. 1907 (1938, 1941), which provided compensation to the United States for damage to land and property caused by sulphur dioxide emissions from a smelter across the border in Canada. Compensation was assessed on the basis of the reduction in value of the affected land.

However, environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (biodiversity, amenity, etc - sometimes referred to as “non-use values”) is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify.

(16) Within the field of diplomatic protection, a good deal of guidance is available as to appropriate compensation standards and methods of valuation, especially as concerns personal injury and takings of, or damage to, tangible property. It is well-established that a State may seek compensation in respect of personal injuries suffered by its officials or nationals, over and above any direct injury it may itself have suffered in relation to the same event. Compensable personal injury encompasses not only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage suffered by the individual (sometimes, though not universally, referred to as “moral damage” in national legal systems). Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life. No less than material injury sustained by the injured State, non-material damage is financially assessable and may be the subject of a claim of compensation, as stressed in the “*Lusitania*” case.⁵⁷³ The Umpire considered that international law provides compensation for mental suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to credit and reputation, such injuries being “very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated ...”⁵⁷⁴

⁵⁷³ *UNRIAA*, vol. VII, p. 32 (1923). International tribunals have frequently granted pecuniary compensation for moral injury to private parties. E.g. *Chevreau (France v. United Kingdom)*, *ibid.*, vol. II, p. 1113 (1923); *A.J.I.L.*, vol. 27, 1933, p. 153; *Gage, UNRIAA*, vol. X, p. 226 (1903); *Di Caro, ibid.*, vol. X, p. 597 (1903); *Heirs of Jean Maninat, ibid.*, vol. X, p. 55 (1903).

⁵⁷⁴ *UNRIAA*, vol. VII, p. 32 (1923), at p. 40.

(17) International courts and tribunals have undertaken the assessment of compensation for personal injury on numerous occasions. For example, in the *M/V “Saiga”* case,⁵⁷⁵ the Tribunal held that Saint Vincent and the Grenadines’ entitlement to compensation included damages for injury to the crew, their unlawful arrest, detention and other forms of ill-treatment.

(18) Historically compensation for personal injury suffered by nationals or officials of a State arose mainly in the context of mixed claims commissions dealing with State responsibility for injury to aliens. Claims commissions awarded compensation for personal injury both in cases of wrongful death and deprivation of liberty. Where claims were made in respect of wrongful death, damages were generally based on an evaluation of the losses of the surviving heirs or successors, calculated in accordance with the well-known formula of Umpire Parker in the “*Lusitania*” case, estimating:

“the amounts (a) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (b) the pecuniary value to such claimant of the deceased’s personal services in claimant’s care, education, or supervision, and also add (c) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as [the] claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.”⁵⁷⁶

In cases of deprivation of liberty, arbitrators sometimes awarded a set amount for each day spent in detention.⁵⁷⁷ Awards were often increased when abusive conditions of confinement accompanied the wrongful arrest and imprisonment, resulting in particularly serious physical or psychological injury.⁵⁷⁸

⁵⁷⁵ *The M/V “Saiga” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, judgment of 1 July 1999.

⁵⁷⁶ *UNRIAA*, vol. VII, p. 32 (1923), at p. 35.

⁵⁷⁷ E.g. *Topaze*, *ibid.*, vol. IX, p. 387 (1903), at p. 389; *Faulkner*, *ibid.*, vol. IV, p. 67 (1926), at p. 71.

⁵⁷⁸ E.g. *William McNeil*, *ibid.*, vol. V, p. 164 (1931), at p. 168.

(19) Compensation for personal injury has also been dealt with by human rights bodies, in particular the European and Inter-American Court of Human Rights. Awards of compensation encompass material losses (loss of earnings, pensions, medical expenses etc.) and non-material damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment. Hitherto, amounts of compensation or damages awarded or recommended by these bodies have been modest.⁵⁷⁹ Nonetheless, the decisions of human rights bodies on compensation draw on principles of reparation under general international law.⁵⁸⁰

(20) In addition to a large number of lump-sum compensation agreements covering multiple claims,⁵⁸¹ property claims of nationals arising out of an internationally wrongful act have been adjudicated by a wide range of ad hoc and standing tribunals and commissions, with reported cases spanning two centuries. Given the diversity of adjudicating bodies, the awards exhibit considerable variability.⁵⁸² Nevertheless, they provide useful principles to guide the determination of compensation under this head of damage.

⁵⁷⁹ See the review by D. Shelton, *Remedies in International Human Rights Law* (Oxford, Clarendon Press, 1999), chs. 8, 9; A. Randelzhofer & C. Tomuschat (eds.), *State Responsibility and the Individual. Reparation in Instances of Grave Violations of Human Rights* (The Hague, Nijhoff, 1999); R. Pisillo Mazzeschi, "La riparazione per violazione dei diritti umani nel diritto internazionale e nella Convenzione Europea", *La Comunità Internazionale*, vol. 53 (1998), p. 215.

⁵⁸⁰ See e.g. the decision of the Inter-American Court in the *Velásquez Rodríguez*, *Inter-Am.Ct.H.R., Series C, No. 4* (1989) at pp. 26-27, 30-1. Cf. also *Papamichalopoulos v. Greece (Article 50)*, *E.C.H.R., Series A, No. 330-B* (1995), at para. 36.

⁵⁸¹ See e.g. R.B. Lillich & B.H. Weston, *International Claims: Their Settlement by Lump Sum Agreements* (Charlottesville, University Press of Virginia, 1975); B.H. Weston, R.B. Lillich and D.J. Bederman, *International Claims: Their Settlement by Lump Sum Agreements, 1975-1995* (Ardsley, N.Y., Transnational Publishers, 1999).

⁵⁸² Controversy has persisted in relation to expropriation cases, particularly over standards of compensation applicable in light of the distinction between lawful expropriation of property by the State on the one hand, and unlawful takings on the other, a distinction clearly drawn by the Permanent Court in *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17* p. 47. In a number of cases tribunals have employed the distinction to rule in favour of compensation for lost profits in cases of unlawful takings (see e.g. the observations of the arbitrator in *Libyan American Oil Company (LIAMCO) v. Government of Libya*, (1982) *I.L.R.*, vol. 62, p. 141, at pp. 202-203; and also the *Aminoil* arbitration: *Government of Kuwait v. American Independent Oil Company*, (1982) *I.L.R.*, vol. 66, p. 529, at p. 600, para. 138; and *Amoco International*

(21) The reference point for valuation purposes is the loss suffered by the claimant whose property rights have been infringed. This loss is usually assessed by reference to specific heads of damage relating to (i) compensation for capital value, (ii) compensation for loss of profits, and (iii) incidental expenses.

(22) Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the “fair market value” of the property lost.⁵⁸³ The method used to assess “fair market value”, however, depends on the nature of the asset concerned. Where the property in question or comparable property is freely traded on an open market, value is more readily determined. In such cases, the choice and application of asset-based valuation methods based on market data and the physical properties of the assets is relatively unproblematic, apart from evidentiary difficulties associated with long outstanding

Finance Corporation v. Government of the Islamic Republic of Iran, (1987) 15 *Iran-U.S.C.T.R.* 189, at p. 246, para. 192). Not all cases, however, have drawn a distinction between the applicable compensation principles based on the lawfulness or unlawfulness of the taking. See e.g. the decision of the Iran-United States Tribunal in *Phillips Petroleum Co. Iran v. Government of the Islamic Republic of Iran*, (1989) 21 *Iran-U.S.C.T.R.* 79, at p. 122, para. 110. See also *Starrett Housing Corp. v. Government of the Islamic Republic of Iran*, (1987) 16 *Iran-U.S.C.T.R.* 79 where the Tribunal made no distinction in terms of the lawfulness of the taking and its award included compensation for lost profits.

⁵⁸³ See *American International Group, Inc. v. Government of the Islamic Republic of Iran*, which stated that, under general international law, “the valuation should be made on the basis of the fair market value of the shares”: (1983) 4 *Iran-U.S.C.T.R.* 96, at p. 106. In *Starrett Housing Corp. v. Government of the Islamic Republic of Iran*, the Tribunal accepted its expert’s concept of fair market value “as the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat”: (1987) 16 *Iran-U.S.C.T.R.* 112, at p. 201. See also the *World Bank Guidelines on the Treatment of Foreign Direct Investment*, which state in paragraph 3 of Part IV that compensation “will be deemed adequate if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known”: World Bank, *Legal Framework for the Treatment of Foreign Investment*, 2 vols., (Washington, I.B.R.D., 1992), vol. II, p. 41. Likewise, according to Article 13 (1) of the Energy Charter Treaty, *I.L.M.*, vol. 33 (1994), p. 360, compensation for expropriation “shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation ...”

claims.⁵⁸⁴ Where the property interests in question are unique or unusual, for example, art works or other cultural property,⁵⁸⁵ or are not the subject of frequent or recent market transactions, the determination of value is more difficult. This may be true, for example, in respect of certain business entities in the nature of a going concern, especially if shares are not regularly traded.⁵⁸⁶

(23) Decisions of various ad hoc tribunals since 1945 have been dominated by claims in respect of nationalized business entities. The preferred approach in these cases has been to examine the assets of the business, making allowance for goodwill and profitability as appropriate. This method has the advantage of grounding compensation as much as possible in some objective assessment of value linked to the tangible asset backing of the business. The value of goodwill and other indicators of profitability may be uncertain, unless derived from information provided by a recent sale or acceptable arms-length offer. Yet, for profitable business entities where the whole is greater than the sum of the parts, compensation would be incomplete without paying due regard to such factors.⁵⁸⁷

(24) An alternative valuation method for capital loss is the determination of net book value, i.e., the difference between the total assets of the business and total liabilities as shown on its books. Its advantages are that the figures can be determined by reference to market costs, they

⁵⁸⁴ Particularly in the case of lump sum settlements, agreements have been concluded decades after the claims arose. See e.g. the U.S.S.R.-U.K. Agreement of 15 July 1986 concerning claims dating back to 1917 and the China-U.K. Agreement of 5 June 1987 in respect of claims arising in 1949. In such cases, the choice of valuation method was sometimes determined by availability of evidence.

⁵⁸⁵ See Report and Recommendations Made by the Panel of Commissioners concerning Part Two of the First Instalment of Individual Claims for Damages above US\$ 100,000, 12 March 1998, S/AC.26/1998/3, paras. 48-49, where the U.N.C.C. considered a compensation claim in relation to the taking of the claimant's Islamic art collection by Iraqi military personnel.

⁵⁸⁶ Where share prices provide good evidence of value, they may be utilized, as in *INA Corporation v. Islamic Republic of Iran*, (1985) 8 *Iran-U.S.C.T.R.* 373.

⁵⁸⁷ Early claims recognized that that even where a taking of property was lawful, compensation for a going concern called for something more than the value of the property elements of the business. The American-Mexican Claims Commission in rejecting a claim for lost profits in the case of a lawful taking stated that payment for property elements would be "augmented by the existence of those elements which constitute a going concern": *Wells Fargo and Company v. Mexico (Decision No. 22-B)*, American-Mexican Claims Commission (1926), p. 153. See also Decision No. 9 of the United Nations Compensation Commission Governing Council, S/AC.26/1992/9, para. 16.

are normally drawn from a contemporaneous record, and they are based on data generated for some other purpose than supporting the claim. Accordingly, net book value (or some variant of this method) has been employed to assess the value of businesses. The limitations of the method lie in the reliance on historical figures, the use of accounting principles which tend to undervalue assets, especially in periods of inflation, and the fact that the purpose for which the figures were produced does not take account of the compensation context and any rules specific to it. The balance sheet may contain an entry for goodwill, but the reliability of such figures depends upon their proximity to the moment of an actual sale.

(25) In cases where a business is not a going concern,⁵⁸⁸ so-called “break-up”, “liquidation” or “dissolution” value is generally employed. In such cases no provision is made for value over and above the market value of the individual assets. Techniques have been developed to construct, in the absence of actual transactions, hypothetical values representing what a willing buyer and willing seller might agree.⁵⁸⁹

(26) Since 1945, valuation techniques have been developed to factor in different elements of risk and probability.⁵⁹⁰ The discounted cash flow (DCF) method has gained some favour, especially in the context of calculations involving income over a limited duration, as in the case of wasting assets. Although developed as a tool for assessing commercial value, it can also be

⁵⁸⁸ For an example of a business found not to be a going concern see *Phelps Dodge Corp. v. Islamic Republic of Iran*, (1986) 10 *Iran-U.S.C.T.R.* 121 where the enterprise had not been established long enough to demonstrate its viability. In *Sedco v. NIOC*, claimant sought dissolution value only: (1986) 10 *Iran-U.S.C.T.R.* 180.

⁵⁸⁹ The hypothetical nature of the result is discussed in *Amoco International Finance Corp. v. Islamic Republic of Iran*, (1987) 15 *Iran-U.S.C.T.R.* 189, at pp. 256-7, paras. 220-223.

⁵⁹⁰ See for example the detailed methodology developed by the U.N.C.C. for assessing Kuwaiti corporate claims (Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of “E4” Claims, 19 March 1999, S/AC.26/1999/4, paras 32-62) and claims filed on behalf of non-Kuwaiti corporations and other business entities, excluding oil sector, construction/engineering and export guarantee claims (Report and Recommendations made by the Panel of Commissioners concerning the Third Instalment of “E2” Claims, 9 December 1999, S/AC.26/1999/22).

useful in the context of calculating value for compensation purposes.⁵⁹¹ But difficulties can arise in the application of the DCF method to establish capital value in the compensation context. The method analyses a wide range of inherently speculative elements, some of which have a significant impact upon the outcome (e.g. discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks). This has led tribunals to adopt a cautious approach to the use of the method. Hence although income-based methods have been accepted in principle, there has been a decided preference for asset-based methods.⁵⁹² A particular concern is the risk of double-counting which arises from the relationship between the capital value of an enterprise and its contractually based profits.⁵⁹³

(27) Paragraph 2 of article 36 recognizes that in certain cases compensation for loss of profits may be appropriate. International tribunals have included an award for loss of profits in assessing compensation: for example the decisions in the *Cape Horn Pigeon* case⁵⁹⁴ and

⁵⁹¹ The use of the discounted cash flow method to assess capital value was analysed in some detail in *Amoco International Finance Corp. v. Islamic Republic of Iran*, (1987) 15 *Iran-U.S.C.T.R.* 189; *Starrett Housing Corp. v. Islamic Republic of Iran*, (1987) 16 *Iran-U.S.C.T.R.* 112; *Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, (1989) 21 *Iran U.S.C.T.R.* 79; and *Ebrahimi (Shahin Shaine) v. Islamic Republic of Iran*, (1994) 30 *Iran U.S.C.T.R.* 170.

⁵⁹² See e.g. *Amoco International Finance Corp. v. Islamic Republic of Iran*, 15 *Iran-U.S.C.T.R.* 189 (1987); *Starrett Housing Corp. v. Islamic Republic of Iran*, 16 *Iran-U.S.C.T.R.* 112 (1987), *Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, 21 *Iran-U.S.C.T.R.* 79 (1989). In the context of claims for lost profits, there is a corresponding preference for claims to be based on past performance rather than forecasts. For example, the United Nations Compensation Commission guidelines on valuation of business losses in Decision 9 (S/AC.26/1992/9, para. 19) state: “The method of a valuation should therefore be one that focuses on past performance rather than on forecasts and projections into the future.”

⁵⁹³ See e.g. *Ebrahimi (Shahin Shaine) v. Islamic Republic of Iran*, (1994) 30 *Iran-U.S.C.T.R.* 170, para. 159.

⁵⁹⁴ *United States of America v. Russia*, *UNRIAA*, vol. IX, p. 63 (1902), (including compensation for lost profits resulting from the seizure of an American whaler). Similar conclusions were reached in the *Delagoa Bay Railway* case (1900), Martens, *Nouveau Recueil*, 2nd series, vol. XXX, p. 329; Moore, *International Arbitrations*, vol. II, p. 1865 (1900), the *William Lee* case, Moore, *International Arbitrations*, vol. IV, pp. 3405-3407 (1867) and the *Yuille Shortridge and Co.* case (*Great Britain v. Portugal*), de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. II, p. 78 (1861). Contrast the decisions in the *Canada* case (*United States of America v. Brazil*), Moore, *International Arbitrations*, vol. II, p. 1733 (1870) and the *Lacaze* case, de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. II, p. 290.

Sapphire International Petroleum Ltd. v. National Iranian Oil Company.⁵⁹⁵ Loss of profits played a role in the *Factory at Chorzów* case itself, the Permanent Court deciding that the injured party should receive the value of property by way of damages not as it stood at the time of expropriation but at the time of indemnification.⁵⁹⁶ Awards for loss of profits have also been made in respect of contract-based lost profits in *Libyan American Oil Company (LIAMCO) v. Libya*⁵⁹⁷ and in some I.C.S.I.D. arbitrations.⁵⁹⁸ Nevertheless, lost profits have not been as commonly awarded in practice as compensation for accrued losses. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements.⁵⁹⁹ When compared with tangible assets, profits (and intangible assets which are income-based) are relatively vulnerable to commercial and political risks, and increasingly so the further into the future projections are made. In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a

⁵⁹⁵ (1963) *I.L.R.*, vol. 35, p. 136, at pp. 187, 189.

⁵⁹⁶ *Factory at Chorzów (Merits)*, 1928, *P.C.I.J. Series A, No. 17*, pp. 47-48, 53.

⁵⁹⁷ (1977) *I.L.R.*, vol. 62, p. 140.

⁵⁹⁸ See, e.g., *Amco Asia Corp. and Others v. Republic of Indonesia*, First Arbitration (1984); Annulment (1986); Resubmitted Case, (1990) 1 *I.C.S.I.D. Reports* 377; *AGIP Spa v. Government of the People's Republic of the Congo*, (1979) 1 *I.C.S.I.D. Reports* 306.

⁵⁹⁹ According to the arbitrator in the *Shufeldt (USA/Guatemala)* case, *UNRIAA*, vol. II, p. 1079 (1930), at p. 1099, “the *lucrum cessans* must be the direct fruit of the contract and not too remote or speculative”. See also *Amco Asia Corp. and Others v. Republic of Indonesia*, (1990) 1 *I.C.S.I.D. Reports* 569, at p. 612, para. 178 where it was stated that “non-speculative profits” were recoverable. The U.N.C.C. has also stressed the requirement for claimants to provide “clear and convincing evidence of ongoing and expected profitability” (see Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of “E3” Claims, 17 December 1998 (S/AC.26/1998/13), para. 147). In assessing claims for lost profits on construction contracts, Panels have generally required that the claimant’s calculation take into account the risk inherent in the project (*ibid.*, para. 157; Report and Recommendations made by the Panel of Commissioners concerning the Fourth Instalment of “E3” Claims, 30 September 1999 (S/AC.26/1999/14), para. 126).

legally protected interest of sufficient certainty to be compensable.⁶⁰⁰ This has normally been achieved by virtue of contractual arrangements or, in some cases, a well-established history of dealings.⁶⁰¹

(28) Three categories of loss of profits may be distinguished: first, lost profits from income-producing property during a period when there has been no interference with title as distinct from temporary loss of use; secondly, lost profits from income-producing property between the date of taking of title and adjudication,⁶⁰² and thirdly, lost future profits in which profits anticipated after the date of adjudication are awarded.⁶⁰³

⁶⁰⁰ In considering claims for future profits, the U.N.C.C. Panel dealing with the fourth instalment of “E3” claims expressed the view that in order for such claims to warrant a recommendation, “it is necessary to demonstrate by sufficient documentary and other appropriate evidence a history of successful (i.e. profitable) operation, and a state of affairs which warrants the conclusion that the hypothesis that there would have been future profitable contracts is well founded”: Report and Recommendations made by the Panel of Commissioners concerning the Fourth Instalment of “E3” Claims, 30 September 1999, (S/AC.26/1999/14), para. 140.

⁶⁰¹ According to Whiteman, “in order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were *reasonably* anticipated; and that the profits anticipated were probable and not merely possible”: Whiteman, *Damages*, vol. III, p. 1837.

⁶⁰² This is most commonly associated with the deprivation of property, as opposed to wrongful termination of a contract or concession. If restitution were awarded, the award of lost profits would be analogous to cases of temporary dispossession. If restitution is not awarded, as in the *Factory at Chorzów (Merits)*, 1928, *P.C.I.J. Series A, No. 17*, p. 47 and *Norwegian Shipowners (Norway/USA)*, *UNRIAA*, vol. I, p. 307 (1922), lost profits may be awarded up to the time when compensation is made available as a substitute for restitution.

⁶⁰³ Awards of lost future profits have been made in the context of a contractually protected income stream, as in the *Amco Asia* case (*Amco Asia Corp. and Others v. Republic of Indonesia*, First Arbitration (1984); Annulment (1986); Resubmitted Case, (1990) 1 *I.C.S.I.D. Reports* 377), rather than on the basis of the taking of income-producing property. In the UN Compensation Commission’s Report and Recommendations on the Second Instalment of “E2” Claims (S/AC.26/1999/6), dealing with reduced profits, the Panel found that losses arising from a decline in business were compensable even though tangible property was not affected and the businesses continued to operate throughout the relevant period (*ibid.*, para. 76).

(29) The first category involves claims for loss of profits due to the temporary loss of use and enjoyment of the income-producing asset.⁶⁰⁴ In these cases there is no interference with title and hence in the relevant period the loss compensated is the income to which the claimant was entitled by virtue of undisturbed ownership.

(30) The second category of claims relates to the unlawful taking of income-producing property. In such cases lost profits have been awarded for the period up to the time of adjudication. In the *Factory at Chorzów* case,⁶⁰⁵ this took the form of re-invested income, representing profits from the time of taking to the time of adjudication. In the *Norwegian Shipowners* case,⁶⁰⁶ lost profits were similarly not awarded for any period beyond the date of adjudication. Once the capital value of income-producing property has been restored through the mechanism of compensation, funds paid by way of compensation can once again be invested to re-establish an income stream. Although the rationale for the award of lost profits in these cases is less clearly articulated, it may be attributed to a recognition of the claimant's continuing beneficial interest in the property up to the moment when potential restitution is converted to a compensation payment.⁶⁰⁷

(31) The third category of claims for loss of profits arises in the context of concessions and other contractually protected interests. Again, in such cases, lost future income has sometimes been awarded.⁶⁰⁸ In the case of contracts, it is the future income stream which is compensated,

⁶⁰⁴ Many of the early cases concern vessels seized and detained. In *The "Montijo"*, an American vessel seized in Panama, the Umpire allowed a sum of money per day for loss of the use of the vessel: Moore, *International Arbitrations*, vol. II, p. 1421 (1875). In *The "Betsey"*, compensation was awarded not only for the value of the cargo seized and detained, but also for demurrage for the period representing loss of use: Moore, *International Adjudications*, vol. V, p. 47, at p. 113 (1794).

⁶⁰⁵ *Factory at Chorzów (Merits)*, 1928, *P.C.I.J. Series A, No. 17*, p. 47.

⁶⁰⁶ *Norwegian Shipowners (Norway/USA)*, *UNRIAA*, vol. I, p. 307 (1922).

⁶⁰⁷ For the approach of the U.N.C.C. in dealing with loss of profits claims associated with the destruction of businesses following the Iraqi invasion of Kuwait, see Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of "E4" Claims, 19 March 1999, (S/AC.26/1999/4), paras. 184-187.

⁶⁰⁸ In some cases, lost profits were not awarded beyond the date of adjudication, though for reasons unrelated to the nature of the income-producing property. See e.g., *Robert May (United States v. Guatemala)*, 1900 For. Rel. 648; Whiteman, *Damages*, vol III, pp. 1704, 1860,

up to the time when the legal recognition of entitlement ends. In some contracts this is immediate, e.g. where the contract is determinable at the instance of the State,⁶⁰⁹ or where some other basis for contractual termination exists. Or it may arise from some future date dictated by the terms of the contract itself.

(32) In other cases lost profits have been excluded on the basis that they were not sufficiently established as a legally protected interest. In the *Oscar Chinn* case⁶¹⁰ a monopoly was not accorded the status of an acquired right. In the *Asian Agricultural Products* case,⁶¹¹ a claim for lost profits by a newly established business was rejected for lack of evidence of established earnings. Claims for lost profits are also subject to the usual range of limitations on the recovery of damages, such as causation, remoteness, evidentiary requirements and accounting principles, which seek to discount speculative elements from projected figures.

(33) If loss of profits are to be awarded, it is inappropriate to award interest under article 38 on the profit-earning capital over the same period of time, simply because the capital sum cannot be simultaneously earning interest and generating profits. The essential aim is to avoid double recovery while ensuring full reparation.

where the concession had expired. In other cases, circumstances giving rise to *force majeure* had the effect of suspending contractual obligations: see e.g. *Gould Marketing, Inc. v. Ministry of Defence*, (1984) 6 *Iran-U.S.C.T.R.* 272; *Sylvania Technical Systems v. Islamic Republic of Iran*, (1985) 8 *Iran-U.S.C.T.R.* 298. In *Delagoa Bay Railway Co. (Great Britain, United States of America/Portugal)*, Martens, *Nouveau Recueil*, 2nd series, vol. XXX, p. 329; Moore, *International Arbitrations*, vol. II, p. 1865 (1900), and in *Shufeldt (USA/Guatemala)*, *UNRIAA*, vol. II, p. 1079 (1930), lost profits were awarded in respect of a concession which had been terminated. In *Sapphire International Petroleum Ltd v. National Iranian Oil Company*, (1963) *I.L.R.*, vol. 35, p. 136; *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, (1977) *I.L.R.*, vol. 62, p. 140 and *Amco Asia Corp. and Others v. Republic of Indonesia*, First Arbitration (1984); Annulment (1986); Resubmitted Case (1990), 1 *I.C.S.I.D. Reports* 377, awards of lost profits were also sustained on the basis of contractual relationships.

⁶⁰⁹ As in *Sylvania Technical Systems v. Islamic Republic of Iran*, (1985) 8 *Iran-U.S.C.T.R.* 298.

⁶¹⁰ 1934, *P.C.I.J.*, Series A/B, No. 63, p. 65.

⁶¹¹ *Asian Agricultural Products Ltd v. Democratic Socialist Republic of Sri Lanka*, (1990) 4 *I.C.S.I.D. Reports* 245.

(34) It is well established that incidental expenses are compensable if they were reasonably incurred to repair damage and otherwise mitigate loss arising from the breach.⁶¹² Such expenses may be associated for example with the displacement of staff or the need to store or sell undelivered products at a loss.

Article 37

Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Commentary

- (1) Satisfaction is the third form of reparation which the responsible State may have to provide in discharge of its obligation to make full reparation for the injury caused by an internationally wrongful act. It is not a standard form of reparation, in the sense that in many cases the injury caused by an internationally wrongful act of a State may be fully repaired by restitution and/or compensation. The rather exceptional character of the remedy of satisfaction, and its relationship to the principle of full reparation, are emphasized by the phrase “insofar as [the injury] cannot be made good by restitution or compensation”. It is only in those cases where those two forms have not provided full reparation that satisfaction may be required.
- (2) Article 37 is divided into three paragraphs, each dealing with a separate aspect of satisfaction. Paragraph 1 addresses the legal character of satisfaction and the types of injury for which it may be granted. Paragraph 2 describes, in a non-exhaustive fashion, some modalities of

⁶¹² Compensation for incidental expenses has been awarded by the United Nations Compensation Commission (Report and Recommendations on the First Instalment of “E2” Claims (S/AC.26/1998/7) where compensation was awarded for evacuation and relief costs (paras. 133, 153 and 249), repatriation (para. 228), termination costs (para. 214), renovation costs (para. 225) and expenses in mitigation (para. 183)) and by the Iran-United States Claims Tribunal (see *General Electric Company v. Islamic Republic of Iran*, (1991) 26 *Iran-U.S.C.T.R.* 148, at pp. 165-167, 168-169, paras. 56-60, 67-69, awarding compensation for items resold at a loss and for storage costs).

satisfaction. Paragraph 3 places limitations on the obligation to give satisfaction, having regard to former practices in cases where unreasonable forms of satisfaction were sometimes demanded.

(3) In accordance with paragraph 1, the injury for which a responsible State is obliged to make full reparation embraces “any damage, whether material or moral, caused by the internationally wrongful act of a State.” Material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation. Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned.

(4) The availability of the remedy of satisfaction for injury of this kind, sometimes described as “non-material injury”,⁶¹³ is well-established in international law. The point was made, for example, by the Tribunal in the *Rainbow Warrior* arbitration:

“There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities”.⁶¹⁴

State practice also provides many instances of claims for satisfaction in circumstances where the internationally wrongful act of a State causes non-material injury to another State. Examples include situations of insults to the symbols of the State, such as the national flag,⁶¹⁵ violations of

⁶¹³ See C. Dominicé, “De la réparation constructive du préjudice immatériel souffert par un État”, in *L'ordre juridique international entre tradition et innovation; Recueil d'études* (Paris, P.U.F., 1997) p. 349, at p. 354.

⁶¹⁴ *Rainbow Warrior (New Zealand/France)*, UNRIAA, vol. XX, p. 217 (1990), at pp. 272-273, para. 122.

⁶¹⁵ Examples are the *Magee* case (1874) (Whiteman, *Damages*, vol. I, p. 64), the *Petit Vaisseau* case (1863) (Whiteman, *Damages*, 2nd series, vol. III, No. 2564) and the case that arose from the insult to the French flag in Berlin in 1920 (C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), pp. 186-187).

sovereignty or territorial integrity,⁶¹⁶ attacks on ships or aircraft,⁶¹⁷ ill-treatment of or deliberate attacks on heads of State or Government or diplomatic or consular representatives or other protected persons⁶¹⁸ and violations of the premises of embassies or consulates or of the residences of members of the mission.⁶¹⁹

(5) Paragraph 2 of article 37 provides that satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. The forms of satisfaction listed in the article are no more than examples. The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.⁶²⁰ Many possibilities exist, including due inquiry into the causes of an accident resulting in harm or

⁶¹⁶ As occurred in the *Rainbow Warrior* arbitration, *UNRIAA*, vol. XX, p. 217 (1990).

⁶¹⁷ Examples include the attack carried out in 1961 against a Soviet aircraft transporting President Brezhnev by French fighter planes over the international waters of the Mediterranean (*R.G.D.I.P.*, vol. 65 (1961), p. 603); and the sinking of a Bahamian ship in 1980 by a Cuban aircraft (*R.G.D.I.P.*, vol. 84 (1980), pp. 1078-1079).

⁶¹⁸ See F. Przetacznik, "La responsabilité internationale de l'Etat à raison des préjudices de caractère moral et politique causés à un autre Etat", *R.G.D.I.P.*, vol. 78 (1974), p. 917, at p. 951.

⁶¹⁹ Examples include the attack by demonstrators in 1851 on the Spanish Consulate in New Orleans (Moore, *Digest*, vol. VI, p. 811, at p. 812), and the failed attempt of two Egyptian policemen, in 1888, to intrude upon the premises of the Italian Consulate at Alexandria (*La prassi italiana di diritto internazionale*, 2nd series, (Dobbs Ferry, N.Y., Oceana, 1970) vol. III, No. 2558). Also see cases of apologies and expressions of regret following demonstrations in front of the French Embassy in Belgrade in 1961 (*R.G.D.I.P.*, vol. 65 (1961), p. 610), and the fires in the libraries of the United States Information Services in Cairo in 1964 (*R.G.D.I.P.*, vol. 69 (1965), pp. 130-131) and in Karachi in 1965 (*R.G.D.I.P.*, vol. 70 (1966), pp. 165-166).

⁶²⁰ In the *Rainbow Warrior* arbitration the Tribunal, while rejecting New Zealand's claims for restitution and/or cessation and declining to award compensation, made various declarations by way of satisfaction, and in addition a recommendation "to assist [the parties] in putting an end to the present unhappy affair". Specifically it recommended that France contribute US\$2 million to a fund to be established "to promote close and friendly relations between the citizens of the two countries". See *UNRIAA*, vol. XX, p. 217 (1990), at p. 274, paras. 126-127. See further L. Migliorino, "Sur la déclaration d'illicéité comme forme de satisfaction: à propos de la sentence arbitrale du 30 avril 1990 dans l'affaire du Rainbow warrior", *R.G.D.I.P.*, vol. 96 (1992), p. 61.

injury,⁶²¹ a trust fund to manage compensation payments in the interests of the beneficiaries, disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act⁶²² or the award of symbolic damages for non-pecuniary injury.⁶²³ Assurances or guarantees of non-repetition, which are dealt with in the Articles in the context of cessation, may also amount to a form of satisfaction.⁶²⁴ Paragraph 2 does not attempt to list all the possibilities, but neither is it intended to exclude them. Moreover the order of the modalities of satisfaction in paragraph 2 is not intended to reflect any hierarchy or preference. Paragraph 2 simply gives examples which are not listed in order of appropriateness or seriousness. The appropriate mode, if any, will be determined having regard to the circumstances of each case.

(6) One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal. The utility of declaratory relief as a form of satisfaction in the case of non-material injury to a State was affirmed by the International Court in the *Corfu Channel* case, where the Court, after finding unlawful a mine-sweeping operation (Operation Retail) carried out by the British Navy after the explosion, said:

“to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty. This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.”⁶²⁵

⁶²¹ E.g. the United States naval inquiry into the causes of the collision between an American submarine and the Japanese fishing vessel, the *Ehime Maru*, in waters off Honolulu: *New York Times*, 8 February 2001, section 1, p. 1, col. 6.

⁶²² Action against the guilty individuals was requested in the case of the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations (Whiteman, *Digest*, vol. 8, pp. 742-743) and in the case of the killing of two United States officers in Tehran (*R.G.D.I.P.*, vol. 80, p. 257).

⁶²³ See, e.g., *The “I’m Alone”*, *UNRIAA*, vol. III, p. 1609 (1935); *Rainbow Warrior*, *ibid.*, vol. XX, p. 217 (1990).

⁶²⁴ See commentary to article 30, para. (11).

⁶²⁵ *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 4, at p. 35, repeated in the *dispositif* at p. 36.

This has been followed in many subsequent cases.⁶²⁶ However, while the making of a declaration by a competent court or tribunal may be treated as a form of satisfaction in a given case, such declarations are not intrinsically associated with the remedy of satisfaction. Any court or tribunal which has jurisdiction over a dispute has the authority to determine the lawfulness of the conduct in question and to make a declaration of its findings, as a necessary part of the process of determining the case. Such a declaration may be a preliminary to a decision on any form of reparation, or it may be the only remedy sought. What the Court did in the *Corfu Channel* case was to use a declaration as a form of satisfaction in a case where Albania had sought no other form. Moreover such a declaration has further advantages: it should be clear and self-contained and will by definition not exceed the scope or limits of satisfaction referred to in paragraph 3 of article 37. A judicial declaration is not listed in paragraph 2 only because it must emanate from a competent third party with jurisdiction over a dispute, and the Articles are not concerned to specify such a party or to deal with issues of judicial jurisdiction. Instead, article 37 specifies the acknowledgement of the breach by the responsible State as a modality of satisfaction.

(7) Another common form of satisfaction is an apology, which may be given verbally or in writing by an appropriate official or even the head of State. Expressions of regret or apologies were required in the “*I’m Alone*”,⁶²⁷ *Kellett*⁶²⁸ and *Rainbow Warrior* cases,⁶²⁹ and were offered by the responsible State in the *Consular Relations*⁶³⁰ and *LaGrand* cases.⁶³¹ Requests for, or offers of, an apology are a quite frequent feature of diplomatic practice and the tender of a timely apology, where the circumstances justify it, can do much to resolve a dispute. In other

⁶²⁶ E.g., *Rainbow Warrior*, *UNRIAA*, vol. XX, p. 217 (1990), at p. 273, para. 123.

⁶²⁷ *Ibid.*, vol. III, p. 1609 (1935).

⁶²⁸ Moore, *Digest*, vol. V, p. 43 (1897).

⁶²⁹ *UNRIAA*, vol. XX, p. 217 (1990).

⁶³⁰ *Vienna Convention on Consular Relations (Paraguay v. United States)*, *Provisional Measures*, *I.C.J. Reports 1998*, p. 248. For the text of the United States’ apology see U.S. Department of State, Text of Statement Released in Asunción, Paraguay; Press Statement by James P. Rubin, Spokesman, 4 November 1998. For the order discontinuing proceedings, see *I.C.J. Reports 1998*, p. 426.

⁶³¹ *LaGrand (Germany v. United States of America)*, *Provisional Measures*, *I.C.J. Reports 1999*, p. 9, and *LaGrand (Germany v. United States of America)*, *Merits*, judgment of 27 June 2001.

circumstances an apology may not be called for, e.g. where a case is settled on an ex gratia basis, or it may be insufficient. In the *LaGrand* case the Court considered that “an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties”.⁶³²

(8) Excessive demands made under the guise of “satisfaction” in the past⁶³³ suggest the need to impose some limit on the measures that can be sought by way of satisfaction to prevent abuses, inconsistent with the principle of the equality of States.⁶³⁴ In particular, satisfaction is not intended to be punitive in character, nor does it include punitive damages. Paragraph 3 of article 37 places limitations on the obligation to give satisfaction by setting out two criteria: first, the proportionality of satisfaction to the injury; second, the requirement that satisfaction should not be humiliating to the responsible State. It is true that the term “humiliating” is imprecise, but there are certainly historical examples of demands of this kind.

Article 38

Interest

1. Interest on any principal sum payable under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

⁶³² Ibid., para. 123.

⁶³³ E.g., the joint note presented to the Chinese Government in 1900 following the Boxer uprising and the demand by the Conference of Ambassadors against Greece in the “Tellini” affair in 1923: see C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), pp. 187-188.

⁶³⁴ The need to prevent the abuse of satisfaction was stressed by early writers such as J.C. Bluntschli, *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt*, (3rd edn.) (Nördlingen, 1878); French trans. by C. Lardy, *Le droit international codifié*, (5th rev. edn.) (Paris, 1895), pp. 268-269.

Commentary

- (1) Interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case. For this reason the term “principal sum” is used in article 38 rather than “compensation”. Nevertheless, an award of interest may be required in some cases in order to provide full reparation for the injury caused by an internationally wrongful act, and it is normally the subject of separate treatment in claims for reparation and in the awards of tribunals.
- (2) As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgment or award concerning, the claim and to the extent that it is necessary to ensure full reparation.⁶³⁵ Support for a general rule favouring the award of interest as an aspect of full reparation is found in international jurisprudence.⁶³⁶ In *The S.S. “Wimbledon”*, the Permanent Court awarded simple interest at 6 per cent as from the date of judgment, on the basis that interest was only payable “from the moment when the amount of the sum due has been fixed and the obligation to pay has been established”.⁶³⁷
- (3) Issues of the award of interest have frequently arisen in other tribunals, both in cases where the underlying claim involved injury to private parties and where the injury was to the State itself.⁶³⁸ The experience of the Iran-United States Claims Tribunal is worth noting. In *Islamic Republic of Iran v. United States of America (Case A-19)*, the Full Tribunal held that its general jurisdiction to deal with claims included the power to award interest, but it declined to

⁶³⁵ Thus interest may not be allowed where the loss is assessed in current value terms as at the date of the award. See the *Lighthouses* arbitration, *UNRIAA*, vol. XII, p. 155 (1956), at pp. 252-253.

⁶³⁶ See, e.g., the awards of interest made in the *Illinois Central Railroad* case, *UNRIAA*, vol. IV, p. 134 (1926); the *Lucas* case (1966) *I.L.R.*, vol. 30, p. 220; see also *Administrative Decision No. III* of the United States-German Mixed Claims Commission, *UNRIAA*, vol. VII, pp. 66 (1923).

⁶³⁷ 1923, *P.C.I.J., Series A, No. 1*, p. 32. The Court accepted the French claim for an interest rate of 6 per cent as fair, having regard to “the present financial situation of the world and ... the conditions prevailing for public loans”.

⁶³⁸ In *The M/V “Saiga” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, the International Tribunal on the Law of the Sea awarded interest at different rates in respect of different categories of loss: see judgment of 1 July 1999, para. 173.

lay down uniform standards for the award of interest on the ground that this fell within the jurisdiction of each Chamber and related “to the exercise ... of the discretion accorded to them in deciding each particular case”.⁶³⁹ On the issue of principle the Tribunal said:

“Claims for interest are part of the compensation sought and do not constitute a separate cause of action requiring their own independent jurisdictional grant. This Tribunal is required by Article V of the Claims Settlement Declaration to decide claims ‘on the basis of respect for law’. In doing so, it has regularly treated interest, where sought, as forming an integral part of the ‘claim’ which it has a duty to decide. The Tribunal notes that the Chambers have been consistent in awarding interest as ‘compensation for damages suffered due to delay in payment’... Indeed, it is customary for arbitral tribunals to award interest as part of an award for damages, notwithstanding the absence of any express reference to interest in the *compromis*. Given that the power to award interest is inherent in the Tribunal’s authority to decide claims, the exclusion of such power could only be established by an express provision in the Claims Settlement Declaration. No such provision exists. Consequently, the Tribunal concludes that it is clearly within its power to award interest as compensation for damage suffered.”⁶⁴⁰

The Tribunal has awarded interest at a different and slightly lower rate in respect of intergovernmental claims.⁶⁴¹ It has not awarded interest in certain cases, for example where a lump-sum award was considered as reflecting full compensation, or where other special circumstances pertained.⁶⁴²

⁶³⁹ (1987) 16 *Iran-U.S.C.T.R.* 285, at p. 290. G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996) pp. 475-6 points out, the practice of the three Chambers has not been entirely uniform.

⁶⁴⁰ (1987) 16 *Iran-U.S.C.T.R.* 285, at pp. 289-90.

⁶⁴¹ See C.N. Brower & J.D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague, Nijhoff, 1998), pp. 626-7, with references to the cases. The rate adopted was 10 per cent, as compared with 12 per cent for commercial claims.

⁶⁴² See the detailed analysis of Chamber Three in *McCollough & Co. Inc. v. Ministry of Post, Telegraph & Telephone & Others*, (1986) 11 *Iran-U.S.C.T.R.* 3, at pp. 26-31.

(4) Decision 16 of the Governing Council of the United Nations Compensation Commission deals with the question of interest. It provides:

- “1. Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.
2. The methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time.
3. Interest will be paid after the principal amount of awards.”⁶⁴³

This provision combines a decision in principle in favour of interest where necessary to compensate a claimant with flexibility in terms of the application of that principle. At the same time, interest, while a form of compensation, is regarded as a secondary element, subordinated to the principal amount of the claim.

(5) Awards of interest have also been envisaged by human rights courts and tribunals, even though the compensation practice of these bodies is relatively cautious and the claims are almost always unliquidated. This is done, for example, to protect the value of a damages award payable by instalments over time.⁶⁴⁴

(6) In their more recent practice, national compensation commissions and tribunals have also generally allowed for interest in assessing compensation. However in certain cases of partial lump-sum settlements, claims have been expressly limited to the amount of the principal loss, on the basis that with a limited fund to be distributed, claims to principal should take priority.⁶⁴⁵

⁶⁴³ “Awards of Interest”, Decision 16 of 4 January 1993 (S/AC.26/1992/16).

⁶⁴⁴ See e.g. *Velásquez Rodríguez (Compensatory Damages) Inter-Am.Ct.H.R., Series C, No. 7 (1990)*, para. 57. See also *Papamichalopoulos v. Greece (Article 50), E.C.H.R., Series A, No. 330-B (1995)*, para. 39 where interest was payable only in respect of the pecuniary damage awarded. See further D. Shelton, *Remedies in International Human Rights Law* (Oxford, Clarendon Press, 1999), pp. 270-2.

⁶⁴⁵ See e.g. the Foreign Compensation (People’s Republic of China) Order 1987 (U.K.), s. 10, giving effect to a Settlement Agreement of 5 June 1987: *U.K.T.S. No. 37 (1987)*.

Some national court decisions have also dealt with issues of interest under international law,⁶⁴⁶ although more often questions of interest are dealt with as part of the law of the forum.

(7) Although the trend of international decisions and practice is towards greater availability of interest as an aspect of full reparation, an injured State has no automatic entitlement to the payment of interest. The awarding of interest depends on the circumstances of each case; in particular, on whether an award of interest is necessary in order to ensure full reparation. This approach is compatible with the tradition of various legal systems as well as the practice of international tribunals.

(8) An aspect of the question of interest is the possible award of compound interest. The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest. For example, the Iran-United States Claims Tribunal has consistently denied claims for compound interest, including in cases where the claimant suffered losses through compound interest charges on indebtedness associated with the claim. In *R.J. Reynolds Tobacco Co. v. Government of the Islamic Republic of Iran*, the Tribunal failed to find ...

“any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, ‘[t]here are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable’ ... Even though the term ‘all sums’ could be construed to include interest and thereby to allow compound interest, the Tribunal, due to the ambiguity of the language, interprets the clause in the light of the international rule just stated, and thus excludes compound interest.”⁶⁴⁷

Consistent with this approach the Tribunal has gone behind contractual provisions appearing to provide for compound interest, in order to prevent the claimant gaining a profit “wholly out of proportion to the possible loss that [it] might have incurred by not having the amounts

⁶⁴⁶ See, e.g., *McKesson Corporation v. Islamic Republic of Iran*, 116 F. Supp. 2d 13 (District Court, D.C., 2000).

⁶⁴⁷ (1984) 7 *Iran-U.S.C.T.R.* 181, at pp. 191-2, citing Whiteman, *Damages*, vol. III, p. 1997.

due at its disposal”.⁶⁴⁸ The preponderance of authority thus continues to support the view expressed by Arbitrator Huber in the *British Claims in the Spanish Zone of Morocco* case:

“the arbitral case law in matters involving compensation of one State for another for damages suffered by the nationals of one within the territory of the other ... is unanimous ... in disallowing compound interest. In these circumstances, very strong and quite specific arguments would be called for to grant such interest ...”⁶⁴⁹

The same is true for compound interest in respect of State-to-State claims.

(9) Nonetheless several authors have argued for a reconsideration of this principle, on the ground that “compound interest reasonably incurred by the injured party should be recoverable as an item of damage”.⁶⁵⁰ This view has also been supported by arbitral tribunals in some cases.⁶⁵¹ But given the present state of international law it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation.

(10) The actual calculation of interest on any principal sum payable by way of reparation raises a complex of issues concerning the starting date (date of breach,⁶⁵² date on which payment

⁶⁴⁸ *Anaconda-Iran, Inc. v. Government of the Islamic Republic of Iran*, (1986) 13 *Iran-U.S.C.T.R.* 199, at p. 235. See also G. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996) pp. 477-478.

⁶⁴⁹ *UNRIAA*, vol. II, p. 615 (1924), at p. 650. Cf. the *Aminoil* arbitration, where the interest awarded was compounded for a period without any reason being given. This accounted for more than half of the total final award: *Government of Kuwait v. American Independent Oil Co.*, (1982) *I.L.R.*, vol. 66, p. 519, at p. 613, para. 178 (5).

⁶⁵⁰ E.g., F.A. Mann, “Compound Interest as an Item of Damage in International Law”, in *Further Studies in International Law* (Oxford, Clarendon Press, 1990) p. 377 at p. 383.

⁶⁵¹ See e.g. *Compañía des Desarrollo de Santa Elena SA v. Republic of Costa Rica*, I.C.S.I.D. Case No. ARB/96/1, final award of 1 February 2000, paras. 103-105.

⁶⁵² Using the date of the breach as the starting date for calculation of the interest term is problematic as there may be difficulties in determining that date, and many legal systems require a demand for payment by the claimant before interest will run. The date of formal demand was taken as the relevant date in the *Russian Indemnity* case, *UNRIAA*, vol. XI, p. 421 (1912), at p. 442, by analogy from the general position in European legal systems. In any event, failure to make a timely claim for payment is relevant in deciding whether to allow interest.

should have been made, date of claim or demand), the terminal date (date of settlement agreement or award, date of actual payment) as well as the applicable interest rate (rate current in the respondent State, in the applicant State, international lending rates). There is no uniform approach, internationally, to questions of quantification and assessment of amounts of interest payable.⁶⁵³ In practice the circumstances of each case and the conduct of the parties strongly affect the outcome. There is wisdom in the Iran-United States Claims Tribunal's observation that such matters, if the parties cannot resolve them, must be left "to the exercise ... of the discretion accorded to [individual tribunals] in deciding each particular case".⁶⁵⁴ On the other hand the present unsettled state of practice makes a general provision on the calculation of interest useful. Accordingly article 38 indicates that the date from which interest is to be calculated is the date when the principal sum should have been paid. Interest runs from that date until the date the obligation to pay is fulfilled. The interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act.

(11) Where a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery. A capital sum cannot be earning interest *and* notionally employed in earning profits at one and the same time. However, interest may be due on the profits which would have been earned but which have been withheld from the original owner.

⁶⁵³ See e.g. J.Y. Gotanda, *Supplemental Damages in Private International Law* (The Hague, Kluwer, 1998), p. 13. It should be noted that a number of Islamic countries, influenced by the *Shari'a*, prohibit payment of interest under their own law or even under their constitution. However, they have developed alternatives to interest in the commercial and international context. For example payment of interest is prohibited by the Iranian Constitution, Principles 43, 49, but the Guardian Council has held that this injunction does not apply to "foreign governments, institutions, companies and persons, who, according to their own principles of faith, do not consider [interest] as being prohibited ..." See *ibid.* pp. 39-40, with references.

⁶⁵⁴ *Islamic Republic of Iran v. United States of America (Case No. A19)*, (1987) 16 *Iran-US C.T.R.* 285, at p. 290.

(12) Article 38 does not deal with post-judgment or moratory interest. It is only concerned with interest that goes to make up the amount that a court or tribunal should award, i.e. compensatory interest. The power of a court or tribunal to award post-judgement interest is a matter of its procedure.

Article 39

Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

Commentary

(1) Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but where the injured State, or the individual victim of the breach, has materially contributed to the damage by some wilful or negligent act or omission. Its focus is on situations which in national law systems are referred to as “contributory negligence”, “comparative fault”, “faute de la victime”, etc.⁶⁵⁵

(2) Article 39 recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. This is consonant with the principle that full reparation is due for the injury - but nothing more - arising in consequence of the internationally wrongful act. It is also consistent with fairness as between the responsible State and the victim of the breach.

(3) In the *LaGrand* case, the International Court recognized that the conduct of the claimant State could be relevant in determining the form and amount of reparation. There Germany had delayed in asserting that there had been a breach and in instituting proceedings. The Court noted “that Germany may be criticized for the manner in which these proceedings were filed and for their timing”, and stated that it would have taken this factor, among others, into account “had Germany’s submission included a claim for indemnification”.⁶⁵⁶

⁶⁵⁵ See C. von Bar, *The Common European Law of Torts, Volume Two* (Munich, Beck, 2000), pp. 517-540.

⁶⁵⁶ *LaGrand (Germany v. United States of America)*, *Merits*, judgment of 27 June 2001, paras. 57, 116. For the relevance of delay in terms of loss of the right to invoke responsibility see article 45 (b) and commentary.

(4) The relevance of the injured State's contribution to the damage in determining the appropriate reparation is widely recognized in the literature⁶⁵⁷ and in State practice.⁶⁵⁸ While questions of an injured State's contribution to the damage arise most frequently in the context of compensation, the principle may also be relevant to other forms of reparation. For example, if a State-owned ship is unlawfully detained by another State and while under detention sustains damage attributable to the negligence of the captain, the responsible State may be required merely to return the ship in its damaged condition.

(5) Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights.⁶⁵⁹ While the notion of a negligent action or omission is not qualified, e.g., by a requirement that the negligence should have reached the level of being "serious" or "gross", the relevance of any negligence to reparation

⁶⁵⁷ See, e.g., B. Graefrath, "Responsibility and Damage Caused: relations between responsibility and damages", in *Recueil des cours*, vol. 185 (1984-II), p. 95; B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973), pp. 265-300.

⁶⁵⁸ In the *Delagoa Bay Railway (Great Britain, USA/Portugal)* case, the arbitrators noted that: "All the circumstances that can be adduced against the concessionaire company and for the Portuguese Government mitigate the latter's liability and warrant ... a reduction in reparation": ((1900), Martens, *Nouveau Recueil*, 2nd series, vol. XXX, p. 329; Moore, *International Arbitrations*, vol. II, p. 1865 (1900)). In *The S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1*, p. 31, a question arose as to whether there had been any contribution to the injury suffered as a result of the ship harbouring at Kiel for some time, following refusal of passage through the Kiel Canal, before taking an alternative course. The Court implicitly acknowledged that the captain's conduct could affect the amount of compensation payable, although it held that the captain had acted reasonably in the circumstances. For other examples see C.D. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), p. 23.

⁶⁵⁹ This terminology is drawn from Article VI (1) of the Convention on the International Liability for Damage caused by Space Objects, United Nations, *Treaty Series*, vol. 961, p. 187.

will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case.⁶⁶⁰ The phrase “account shall be taken” indicates that the article deals with factors that are capable of affecting the form or reducing the amount of reparation in an appropriate case.

(6) The wilful or negligent action or omission which contributes to the damage may be that of the injured State or “any person or entity in relation to whom reparation is sought”. This phrase is intended to cover not only the situation where a State claims on behalf of one of its nationals in the field of diplomatic protection, but also any other situation in which one State invokes the responsibility of another State in relation to conduct primarily affecting some third party. Under articles 42 and 48, a number of different situations can arise where this may be so. The underlying idea is that the position of the State seeking reparation should not be more favourable, so far as reparation in the interests of another is concerned, than it would be if the person or entity in relation to whom reparation is sought were to bring a claim individually.

Chapter III

Serious breaches of obligations under peremptory norms of general international law

(1) Chapter III of Part Two is entitled “Serious Breaches of Obligations Under Peremptory Norms of General International Law”. It sets out certain consequences of specific types of breaches of international law, identified by reference to two criteria: first, they involve breaches of obligations under peremptory norms of general international law; second, the breaches concerned are in themselves serious, having regard to their scale or character. Chapter III contains two articles, the first defining its scope of application (article 40), the second spelling out the legal consequences entailed by the breaches coming within the scope of the chapter (article 41).

⁶⁶⁰ It is possible to envisage situations where the injury in question is entirely attributable to the conduct of the victim and not at all to that of the “responsible” State. Such situations are covered by the general requirement of proximate cause referred to in article 31, rather than by article 39. On questions of mitigation of damage see commentary to article 31, para. (11).

(2) Whether a qualitative distinction should be recognized between different breaches of international law has been the subject of a major debate.⁶⁶¹ The issue was underscored by the International Court of Justice in the *Barcelona Traction* case, when it said that:

“an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”⁶⁶²

The Court was there concerned to contrast the position of an injured State in the context of diplomatic protection with the position of all States in respect of the breach of an obligation towards the international community as a whole. Although no such obligation was at stake in that case, the Court’s statement clearly indicates that for the purposes of State responsibility certain obligations are owed to the international community as a whole, and that by reason of “the importance of the rights involved” all States have a legal interest in their protection.

(3) On a number of subsequent occasions the Court has taken the opportunity to affirm the notion of obligations to the international community as a whole, although it has been cautious in applying it. In the *East Timor* case, the Court said that “Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable.”⁶⁶³ At the preliminary objections stage of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case,

⁶⁶¹ For full bibliographies see M. Spinedi, “Crimes of States: A Bibliography”, in J. Weiler, A. Cassese & M. Spinedi (eds.), *International Crimes of States* (Berlin/New York, De Gruyter, 1989), pp. 339-353 and N. Jørgensen, *The Responsibility of States for International Crimes* (Oxford, Oxford University Press, 2000) pp. 299-314.

⁶⁶² *Barcelona Traction, Light and Power Company, Limited, Second Phase*, I.C.J. Reports 1970, p. 3, at p. 32, para. 33. See M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford, Clarendon Press, 1997).

⁶⁶³ *East Timor (Portugal v. Australia)*, I.C.J. Reports 1995, p. 90, at p. 102, para. 29.

it stated that “the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*”.⁶⁶⁴ this finding contributed to its conclusion that its temporal jurisdiction over the claim was not limited to the time after which the parties became bound by the Convention.

(4) A closely related development is the recognition of the concept of peremptory norms of international law in articles 53 and 64 of the Vienna Convention on the Law of Treaties.⁶⁶⁵ These provisions recognize the existence of substantive norms of a fundamental character, such that no derogation from them is permitted even by treaty.⁶⁶⁶

(5) From the first it was recognized that these developments had implications for the secondary rules of State responsibility which would need to be reflected in some way in the Articles. Initially it was thought this could be done by reference to a category of “international crimes of State”, which would be contrasted with all other cases of internationally wrongful acts (“international delicts”).⁶⁶⁷ There has been, however, no development of penal consequences for States of breaches of these fundamental norms. For example, the award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms. In accordance with article 34 the function of damages is essentially compensatory.⁶⁶⁸ Overall it remains the case, as the International Military Tribunal said in 1946, that:

“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁶⁶⁹

⁶⁶⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996*, p. 595, at p. 616, para. 31.

⁶⁶⁵ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

⁶⁶⁶ See article 26 and commentary.

⁶⁶⁷ See *Yearbook ... 1976*, vol. II Part 2, pp. 95-122, especially paras. 6-34. See also commentary to article 12, para. (5).

⁶⁶⁸ See commentary to article 36, paragraph (4).

⁶⁶⁹ International Military Tribunal for the Trial of the Major War Criminals, judgment of 1 October 1946, reprinted in *A.J.I.L.*, vol. 41 (1947), p. 172, at p. 221.

(6) In line with this approach, despite the trial and conviction by the Nuremburg and Tokyo Military Tribunals of individual government officials for criminal acts committed in their official capacity, neither Germany nor Japan were treated as “criminal” by the instruments creating these tribunals.⁶⁷⁰ As to more recent international practice, a similar approach underlies the establishment of the ad hoc tribunals for Yugoslavia and Rwanda by the United Nations Security Council. Both tribunals are concerned only with the prosecution of individuals.⁶⁷¹ In its decision relating to a *subpoena duces tecum* in *Prosecutor v Blaskić*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia stated that “[u]nder present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems.”⁶⁷² The Rome Statute for an International Criminal Court of 17 July 1998 likewise establishes jurisdiction over the “most serious crimes of concern to the international community as a whole”, but limits this jurisdiction to “natural persons” (art. 25 (1)). The same article specifies that no provision of the Statute “relating to individual criminal responsibility shall affect the responsibility of States under international law”.⁶⁷³

⁶⁷⁰ This despite the fact that the London Charter of 1945 specifically provided for the condemnation of a “group or organization” as “criminal”, cf. Charter of the International Military Tribunal, London, United Nations, *Treaty Series*, vol. 82, p. 279, arts. 9, 10.

⁶⁷¹ See respectively arts. 1, 6 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993 (originally published as an Annex to S/25704 and Add.1, approved by the Security Council by Resolution 827 (1993); amended 13 May 1998 by Resolution 1166 (1998) and 30 November 2000 by Resolution 1329 (2000)); and arts. 1, 7 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for such Violations Committed in the Territory of Neighbouring States, 8 November 1994, approved by the Security Council by Resolution 955 (1994).

⁶⁷² Case IT-95-14-AR 108 *bis*, *Prosecutor v. Blaskić*, *I.L.R.*, vol. 110, p. 688 (1997), at p. 698, para. 25. Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, *I.C.J. Reports 1996*, p. 595, in which neither of the parties treated the proceedings as being criminal in character. See also the commentary to article 12, para. (6).

⁶⁷³ Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, art. 25 (4). See also art. 10: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”

(7) Accordingly the present Articles do not recognize the existence of any distinction between State “crimes” and “delicts” for the purposes of Part One. On the other hand, it is necessary for the Articles to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility. Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which the International Court has given of obligations towards the international community as a whole⁶⁷⁴ all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the Vienna Convention⁶⁷⁵ involve obligations to the international community as a whole. But there is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance - i.e., in terms of the present Articles, in being entitled to invoke the responsibility of any State in breach. Consistently with the difference in their focus, it is appropriate to reflect the consequences of the two concepts in two distinct ways. First, serious

⁶⁷⁴ According to the International Court of Justice, obligations *erga omnes* “derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”: *Barcelona Traction, Light and Power Company, Limited, Second Phase*, I.C.J. Reports 1970, p. 3, at p. 32, para. 34. See also *East Timor (Portugal v. Australia)*, I.C.J. Reports 1995, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996, p. 226, at p. 258, para. 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, I.C.J. Reports 1996, p. 595, at pp. 615-616, paras. 31-32.

⁶⁷⁵ The International Law Commission gave the following examples of treaties which would violate the article due to conflict with a peremptory norm of general international law, or a rule of *jus cogens*: “(a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (b) a treaty contemplating the performance of any other act criminal under international law, and (c) a treaty contemplating or conniving at the commission of such acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to cooperate ... treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples”: *Yearbook ... 1966*, vol. II, p. 248.

breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible State but for all other States. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole. The first of these propositions is the concern of the present chapter; the second is dealt with in article 48.

Article 40

Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Commentary

- (1) Article 40 serves to define the scope of the breaches covered by the chapter. It establishes two criteria in order to distinguish “serious breaches of obligations under peremptory norms of general international law” from other types of breaches. The first relates to the character of the obligation breached, which must derive from a peremptory norm of general international law. The second qualifies the intensity of the breach, which must have been serious in nature. Chapter III only applies to those violations of international law that fulfil both criteria.
- (2) The first criterion relates to the character of the obligation breached. In order to give rise to the application of this chapter, a breach must concern an obligation arising under a peremptory norm of general international law. In accordance with article 53 of the Vienna Convention on the Law of Treaties,⁶⁷⁶ a peremptory norm of general international law is one which is ...

“accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

The concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine.⁶⁷⁷

⁶⁷⁶ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

(3) It is not appropriate to set out examples of the peremptory norms referred to in the text of article 40 itself, any more than it was in the text of article 53 of the Vienna Convention. The obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.

(4) Among these prohibitions, it is generally agreed that the prohibition of aggression is to be regarded as peremptory. This is supported, for example, by the Commission's commentary to what was to become article 53,⁶⁷⁸ uncontradicted statements by Governments in the course of the Vienna Conference,⁶⁷⁹ the submissions of both parties in *Military and Paramilitary Activities* and the Court's own position in that case.⁶⁸⁰ There also seems to be widespread agreement with other examples listed in the Commission's commentary to article 53: viz., the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid. These practices have been prohibited in widely ratified international treaties and conventions admitting of no exception. There was general agreement among governments as to the peremptory character of these prohibitions at the Vienna Conference. As to the peremptory character of the prohibition against genocide, this is supported by a number of decisions by national and international courts.⁶⁸¹

⁶⁷⁷ For further discussion of the requirements for identification of a norm as peremptory see commentary to article 26, para. (5), with selected references to the case-law and literature.

⁶⁷⁸ *Yearbook ... 1966*, vol. II, p. 247.

⁶⁷⁹ In the course of the Vienna conference, a number of Governments characterized as peremptory the prohibitions against aggression and the illegal use of force: see *United Nations Conference on the Law of Treaties, First Session*, A/CONF. 39/11, pp. 294, 296-7, 300, 301, 302, 303, 304, 306, 307, 311, 312, 318, 320, 322, 323-4, 326.

⁶⁸⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, *I.C.J. Reports 1986*, p. 14, at pp. 100-1, para. 190. See also President Nagendra Singh, *ibid.*, at p. 153.

⁶⁸¹ See, for example, the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, *I.C.J. Reports 1993*, p. 325, at pp. 439-440; *Counter-Claims*, *I.C.J. Reports 1997*, p. 243; the District Court of Jerusalem in *Attorney-General of the Government of Israel v. Eichmann*, (1961) *I.L.R.*, vol. 36, p. 5.

- (5) Although not specifically listed in the Commission's commentary to article 53 of the Vienna Convention, the peremptory character of certain other norms seems also to be generally accepted. This applies to the prohibition against torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.⁶⁸² The peremptory character of this prohibition has been confirmed by decisions of international and national bodies.⁶⁸³ In the light of the International Court's description of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory.⁶⁸⁴ Finally, the obligation to respect the right of self-determination deserves to be mentioned. As the International Court noted in the *East Timor* case, "[t]he principle of self-determination ... is one of the essential principles of contemporary international law", which gives rise to an obligation to the international community as a whole to permit and respect its exercise.⁶⁸⁵
- (6) It should be stressed that the examples given above may not be exhaustive. In addition, article 64 of the Vienna Convention contemplates that new peremptory norms of general international law may come into existence through the processes of acceptance and recognition by the international community of States as a whole, as referred to in article 53. The examples given here are thus without prejudice to existing or developing rules of international law which fulfil the criteria for peremptory norms under article 53.

⁶⁸² *United Nations, Treaty Series*, vol. 1465, p. 112.

⁶⁸³ Cf. the U.S. Court of Appeals, 2nd Circuit, in *Siderman de Blake v. Argentina*, (1992) *I.L.R.*, vol. 103, p. 455, at p. 471; the United Kingdom Court of Appeal in *Al Adsani v. Government of Kuwait*, (1996) *I.L.R.*, vol. 107, p. 536 at pp. 540-541; the United Kingdom House of Lords in *R. v. Bow Street Metropolitan Magistrate, ex parte Pinochet Ugarte (No. 3)*, [1999] 2 W.L.R. 827, at pp. 841, 881. Cf. the U.S. Court of Appeals, 2nd Circuit in *Filartiga v. Pena-Irala*, (1980), 630 F.2d 876, *I.L.R.*, vol. 77, p. 169, at pp. 177-179.

⁶⁸⁴ *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports* 1996, p. 226, at p. 257, para. 79.

⁶⁸⁵ *East Timor (Portugal v. Australia)*, *I.C.J. Reports* 1995, p. 90, at p. 102, para. 29. See Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the *United Nations*, G.A. Res. 2625 (XXV) of 24 October 1970, fifth principle.

(7) Apart from its limited scope in terms of the comparatively small number of norms which qualify as peremptory, article 40 applies a further limitation for the purposes of the chapter, viz. that the breach should itself have been “serious”. A “serious” breach is defined in paragraph 2 as one which involves “a gross or systematic failure by the responsible State to fulfil the obligation” in question. The word “serious” signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach and it is not intended to suggest that any violation of these obligations is not serious or is somehow excusable. But relatively less serious cases of breach of peremptory norms can be envisaged, and it is necessary to limit the scope of this chapter to the more serious or systematic breaches. Some such limitation is supported by State practice. For example, when reacting against breaches of international law, States have often stressed their systematic, gross, or egregious nature. Similarly, international complaint procedures, for example in the field of human rights, attach different consequences to systematic breaches, e.g. in terms of the non-applicability of the rule of exhaustion of local remedies.⁶⁸⁶

(8) To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term “gross” refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations, and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.⁶⁸⁷

⁶⁸⁶ See *Ireland v. United Kingdom*, E.C.H.R., Series A, No. 25 (1978), para. 159; cf. e.g. the procedure established under ECOSOC resolution 1503 (XXVIII), which requires a “consistent pattern of gross violations of human rights”.

⁶⁸⁷ In 1976 the Commission proposed the following examples as cases denominated as “international crimes”:

“(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(9) Article 40 does not lay down any procedure for determining whether or not a serious breach has been committed. It is not the function of the Articles to establish new institutional procedures for dealing with individual cases, whether they arise under chapter III of Part Two or otherwise. Moreover the serious breaches dealt with in this chapter are likely to be addressed by the competent international organizations including the Security Council and the General Assembly. In the case of aggression, the Security Council is given a specific role by the Charter.

Article 41

Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

Commentary

- (1) Article 41 sets out the particular consequences of breaches of the kind and gravity referred to in article 40. It consists of three paragraphs. The first two prescribe special legal obligations of States faced with the commission of “serious breaches” in the sense of article 40, the third takes the form of a saving clause.
- (2) Pursuant to paragraph 1 of article 41, States are under a positive duty to cooperate in order to bring to an end serious breaches in the sense of article 40. Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.”

(*Yearbook ... 1976*, vol. II, Part Two, pp. 95-96).

form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation.

(3) Neither does paragraph 1 prescribe what measures States should take in order to bring an end to serious breaches in the sense of article 40. Such cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation.

It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. But in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy. Paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response to the serious breaches referred to in article 40.

(4) Pursuant to paragraph 2 of article 41, States are under a duty of abstention, which comprises two obligations, first, not to recognize as lawful situations created by serious breaches in the sense of article 40, and, second, not to render aid or assistance in maintaining that situation.

(5) The first of these two obligations refers to the obligation of collective non-recognition by the international community as a whole of the legality of situations resulting directly from serious breaches in the sense of article 40.⁶⁸⁸ The obligation applies to “situations” created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples. It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.

(6) The existence of an obligation of non-recognition in response to serious breaches of obligations arising under peremptory norms already finds support in international practice and in

⁶⁸⁸ This has been described as “an essential legal weapon in the fight against grave breaches of the basic rules of international law”: C. Tomuschat, “International Crimes by States: An Endangered Species?”, in K. Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (The Hague, Nijhoff, 1998), p. 253 at p. 259.

decisions of the International Court of Justice. The principle that territorial acquisitions brought about by the use of force are not valid and must not be recognized found a clear expression during the Manchurian crisis of 1931-1932, when the Secretary of State, Henry Stimson, declared that the United States of America - joined by a large majority of members of the League of Nations - would not ...

“admit the legality of any situation de facto nor ... recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the ... sovereignty, the independence or the territorial and administrative integrity of the Republic of China, ... [nor] recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928.”⁶⁸⁹

The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations affirms this principle by stating unequivocally that States shall not recognize as legal any acquisition of territory brought about by the use of force.⁶⁹⁰ As the International Court of Justice held in *Military and Paramilitary Activities*, the unanimous consent of States to this declaration “may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.”⁶⁹¹

(7) An example of the practice of non-recognition of acts in breach of peremptory norms is provided by the reaction of the Security Council to the Iraqi invasion of Kuwait in 1990. Following the Iraqi declaration of a “comprehensive and eternal merger” with Kuwait, the Security Council in Resolution 662 (1990), decided that the annexation had “no legal validity, and is considered null and void”, and called upon all States, international organizations and

⁶⁸⁹ Secretary of State’s note to the Chinese and Japanese Governments, in Hackworth, Digest, vol. I, p. 334; endorsed by Assembly Resolutions of 11 March 1932, *League of Nations Official Journal*, March 1932, Special Supplement No. 101, p. 87. For a review of earlier practice relating to collective non-recognition see J. Dugard, *Recognition and the United Nations* (Cambridge, Grotius, 1987), pp. 24-27.

⁶⁹⁰ G.A. Res. 2625 (XXV), first principle, para. 10.

⁶⁹¹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14, at p. 100, para. 188.

specialized agencies not to recognize that annexation and to refrain from any action or dealing that might be interpreted as a recognition of it, whether direct or indirect. In fact no State recognized the legality of the purported annexation, the effects of which were subsequently reversed.

(8) As regards the denial by a State of the right of self-determination of peoples, the International Court's advisory opinion on *Namibia (South West Africa)* is similarly clear in calling for a non-recognition of the situation.⁶⁹² The same obligations are reflected in Security Council and General Assembly resolutions concerning the situation in Rhodesia⁶⁹³ and the Bantustans in South Africa.⁶⁹⁴ These examples reflect the principle that where a serious breach in the sense of article 40 has resulted in a situation that might otherwise call for recognition, this has nonetheless to be withheld. Collective non-recognition would seem to be a prerequisite for any concerted community response against such breaches and marks the minimum necessary response by States to the serious breaches referred to in article 40.

(9) Under article 41 (2), no State shall recognize the situation created by the serious breach as lawful. This obligation applies to all States, including the responsible State. There have been cases where the responsible State has sought to consolidate the situation it has created by its own "recognition". Evidently the responsible State is under an obligation not to recognize or sustain the unlawful situation arising from the breach. Similar considerations apply even to the injured State: since the breach by definition concerns the international community as a whole, waiver or recognition induced from the injured State by the responsible State cannot preclude the

⁶⁹² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, p. 16, at p. 56, para. 126, where the Court held that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law".

⁶⁹³ Cf. S.C. Res. 216 (1965).

⁶⁹⁴ See e.g. G.A. Res. 31/6A (1976), endorsed by S.C. Res. 402 (1976); G.A. Res. 32/105N (1977); G.A. Res. 34/93G (1979); see also the statements issued by the respective presidents of the United Nations Security Council in reaction to the "creation" of Venda and Ciskei: S/13549, 21 September 1979; S/14794, 15 December 1981.

international community interest in ensuring a just and appropriate settlement. These conclusions are consistent with article 30 on cessation and are reinforced by the peremptory character of the norms in question.⁶⁹⁵

(10) The consequences of the obligation of non-recognition are, however, not unqualified. In the *Namibia (South West Africa)* advisory opinion the Court, despite holding that the illegality of the situation was opposable *erga omnes* and could not be recognized as lawful even by States not members of the United Nations, said that:

“the non-recognition of South Africa’s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.”⁶⁹⁶

Both the principle of non-recognition and this qualification to it have been applied, for example, by the European Court of Human Rights.⁶⁹⁷

(11) The second obligation contained in paragraph 2 prohibits States from rendering aid or assistance in maintaining the situation created by a serious breach in the sense of article 40. This goes beyond the provisions dealing with aid or assistance in the commission of an internationally wrongful act, which are covered by article 16. It deals with conduct “after the fact” which assists the responsible State in maintaining a situation “opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law”.⁶⁹⁸

⁶⁹⁵ See also the commentary to article 20, paragraph (7) and the commentary to article 45, paragraph (4).

⁶⁹⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, p. 16, at p. 56, para. 125.

⁶⁹⁷ *Loizidou v. Turkey, Merits*, E.C.H.R. Reports 1996-VI, p. 2216; *Cyprus v. Turkey* (Application no. 25781/94), judgement of 10 May 2001, paras. 89-98.

⁶⁹⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, p. 16, at p. 56, para. 126.

It extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach, and it applies whether or not the breach itself is a continuing one. As to the elements of “aid or assistance”, article 41 is to be read in connection with article 16. In particular, the concept of aid or assistance in article 16 presupposes that the State has “knowledge of the circumstances of the internationally wrongful act”. There is no need to mention such a requirement in article 41 (2) as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State.

(12) In some respects, the prohibition contained in paragraph 2 may be seen as a logical extension of the duty of non-recognition. However, it has a separate scope of application insofar as actions are concerned which would not imply recognition of the situation created by serious breaches in the sense of article 40. This separate existence is confirmed, for example, in the Security Council’s resolutions prohibiting any aid or assistance in maintaining the illegal apartheid regime in South Africa or Portuguese colonial rule.⁶⁹⁹ Just as in the case of the duty of non-recognition, these resolutions would seem to express a general idea applicable to all situations created by serious breaches in the sense of article 40.

(13) Pursuant to paragraph 3, article 41 is without prejudice to the other consequences elaborated in Part Two and to possible further consequences that a serious breach in the sense of article 40 may entail. The purpose of this paragraph is twofold. First, it makes it clear that a serious breach in the sense of article 40 entails the legal consequences stipulated for all breaches in chapter I and II of Part Two. Consequently, a serious breach in the sense of article 40 gives rise to an obligation, on behalf of the responsible State, to cease the wrongful act, to continue performance and, if appropriate, to give guarantees and assurances of non-repetition. By the same token, it entails a duty to make reparation in conformity with the rules set out in chapter II of this Part. The incidence of these obligations will no doubt be affected by the gravity of the breach in question, but this is allowed for in the actual language of the relevant articles.

(14) Secondly, paragraph 3 allows for such further consequences of a serious breach as may be provided for by international law. This may be done by the individual primary rule, as in the case of the prohibition of aggression. Paragraph 3 accordingly allows that international law may recognize additional legal consequences flowing from the commission of a serious breach in the

⁶⁹⁹ Cf. e.g. S.C. Res. 218 (1965) on the Portuguese colonies and S.C. Res. 418 (1977) and 569 (1985) on South Africa.

sense of article 40. The fact that such further consequences are not expressly referred to in chapter III does not prejudice their recognition in present-day international law, or their further development. In addition, paragraph 3 reflects the conviction that the legal regime of serious breaches is itself in a state of development. By setting out certain basic legal consequences of serious breaches in the sense of article 40, article 41 does not intend to preclude the future development of a more elaborate regime of consequences entailed by such breaches.

PART THREE

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Part Three deals with the implementation of State responsibility, i.e. with giving effect to the obligations of cessation and reparation which arise for a responsible State under Part Two by virtue of its commission of an internationally wrongful act. Although State responsibility arises under international law independently of its invocation by another State, it is still necessary to specify what other States faced with a breach of an international obligation may do, what action they may take in order to secure the performance of the obligations of cessation and reparation on the part of the responsible State. This, sometimes referred to as the *mise-en-oeuvre* of State responsibility, is the subject matter of Part Three. Part Three consists of two chapters. Chapter I deals with the invocation of State responsibility by other States and with certain associated questions. Chapter II deals with countermeasures taken in order to induce the responsible State to cease the conduct in question and to provide reparation.

Chapter I

Invocation of the responsibility of a State

(1) Part One of the Articles identifies the internationally wrongful act of a State generally in terms of the breach of any international obligation of that State. Part Two defines the consequences of internationally wrongful acts in the field of responsibility as obligations of the responsible State, not as rights of any other State person or entity. Part Three is concerned with the implementation of State responsibility, i.e., with the entitlement of other States to invoke the international responsibility of the responsible State and with certain modalities of such invocation. The rights that other persons or entities may have arising from a breach of an international obligation are preserved by article 33 (2).

(2) Central to the invocation of responsibility is the concept of the injured State. This is the State whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act. This concept is introduced in article 42 and various consequences are drawn from it in other articles of this chapter. In keeping with the broad range of international obligations covered by the Articles, it is necessary to recognize that a broader range of States may have a legal interest in invoking responsibility and ensuring compliance with the obligation in question. Indeed in certain situations, all States may have such an interest, even though none of them is individually or specially affected by the breach.⁷⁰⁰ This possibility is recognized in article 48. Articles 42 and 48 are couched in terms of the entitlement of States to invoke the responsibility of another State. They seek to avoid problems arising from the use of possibly misleading terms such as “direct” versus “indirect” injury or “objective” versus “subjective” rights.

(3) Although article 42 is drafted in the singular (“an injured State”), more than one State may be injured by an internationally wrongful act and be entitled to invoke responsibility as an injured State. This is made clear by article 46. Nor are articles 42 and 48 mutually exclusive. Situations may well arise in which one State is “injured” in the sense of article 42, and other States are entitled to invoke responsibility under article 48.

(4) Chapter I also deals with a number of related questions: the requirement of notice if a State wishes to invoke the responsibility of another (article 43), certain aspects of the admissibility of claims (article 44), loss of the right to invoke responsibility (article 45), and cases where the responsibility of more than one State may be invoked in relation to the same internationally wrongful act (article 47).

(5) Reference must also be made to article 55, which makes clear the residual character of the Articles. In addition to giving rise to international obligations for States, special rules may also determine which other State or States are entitled to invoke the international responsibility arising from their breach, and what remedies they may seek. This was true, for example, of article 396 of

⁷⁰⁰ Cf. the International Court of Justice’s statement that “all States can be held to have a legal interest” as concerns breaches of obligations *erga omnes*: *Barcelona Traction, Light and Power Company, Limited, Second Phase*, *I.C.J. Reports 1970*, p. 3, at p. 32, para. 33, cited in commentary to Part Two, chapter III, para. (2).

the Treaty of Versailles of 1919, which was the subject of the decision in *The S.S. Wimbledon*.⁷⁰¹ It is also true of article 33 of the European Convention of Human Rights. It will be a matter of interpretation in each case whether such provisions are intended to be exclusive, i.e. to apply as a *lex specialis*.

Article 42

Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) That State individually; or
- (b) A group of States including that State, or the international community as a whole, and the breach of the obligation:
 - (i) Specially affects that State; or
 - (ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Commentary

(1) Article 42 provides that the implementation of State responsibility is in the first place an entitlement of the “injured State”. It defines this term in a relatively narrow way, drawing a distinction between injury to an individual State or possibly a small number of States and the legal interests of several or all States in certain obligations established in the collective interest. The latter are dealt with in article 48.

(2) This chapter is expressed in terms of the invocation by a State of the responsibility of another State. For this purpose, invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these Articles, protest as such is not an invocation of responsibility; it has a variety of

⁷⁰¹ 1923, *P.C.I.J., Series A, No. 1*. Four States there invoked the responsibility of Germany, at least one of which, Japan, had no specific interest in the voyage of the *S.S. Wimbledon*.

forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal,⁷⁰² or even the taking of countermeasures. In order to take such steps, i.e. to invoke responsibility in the sense of the Articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. a right of action specifically conferred by a treaty,⁷⁰³ or it must be considered an injured State. The purpose of article 42 is to define this latter category.

(3) A State which is injured in the sense of article 42 is entitled to resort to all means of redress contemplated in the Articles. It can invoke the appropriate responsibility pursuant to Part Two. It may also - as is clear from the opening phrase of article 49 - resort to countermeasures in accordance with the rules laid down in chapter II of this Part. The situation of an injured State should be distinguished from that of any other State which may be entitled to invoke responsibility, e.g. under article 48 which deals with the entitlement to invoke responsibility in some shared general interest. This distinction is clarified by the opening phrase of article 42, "A State is entitled as an injured State to invoke the responsibility ...".

(4) The definition in article 42 is closely modelled on article 60 of the Vienna Convention on the Law of Treaties,⁷⁰⁴ although the scope and purpose of the two provisions is different. Article 42 is concerned with any breach of an international obligation of whatever character,

⁷⁰² An analogous distinction is drawn by art. 27 (2) of the Washington Convention of 1965 (Convention on the Settlement of Investment Disputes between States and Nationals of Other States, United Nations, *Treaty Series*, vol. 575, p. 159), which distinguishes between the bringing of an international claim in the field of diplomatic protection and "informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute".

⁷⁰³ In relation to article 42, such a treaty right could be considered a *lex specialis*: see article 55 and commentary.

⁷⁰⁴ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

whereas article 60 is concerned with breach of treaties. Moreover article 60 is concerned exclusively with the right of a State party to a treaty to invoke a material breach of that treaty by another party as grounds for its suspension or termination. It is not concerned with the question of responsibility for breach of the treaty.⁷⁰⁵ This is why article 60 is restricted to “material” breaches of treaties. Only a material breach justifies termination or suspension of the treaty, whereas in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity. Despite these differences, the analogy with article 60 is justified. Article 60 seeks to identify the States parties to a treaty which are entitled to respond individually and in their own right to a material breach by terminating or suspending it. In the case of a bilateral treaty the right can only be that of the other State party, but in the case of a multilateral treaty article 60 (2) does not allow every other State to terminate or suspend the treaty for material breach. The other State must be specially affected by the breach, or at least individually affected in that the breach necessarily undermines or destroys the basis for its own further performance of the treaty.

(5) In parallel with the cases envisaged in article 60 of the Vienna Convention on the Law of Treaties, three cases are identified in article 42. In the first case, in order to invoke the responsibility of another State as an injured State, a State must have an individual right to the performance of an obligation, in the way that a State party to a bilateral treaty has vis-à-vis the other State party (subparagraph (a)). Secondly, a State may be specially affected by the breach of an obligation to which it is a party, even though it cannot be said that the obligation is owed to it individually (subparagraph (b) (i)). Thirdly, it may be the case that performance of the obligation by the responsible State is a necessary condition of its performance by all the other States (subparagraph (b) (ii)); this is the so-called “integral” or “interdependent” obligation.⁷⁰⁶ In each of these cases, the possible suspension or termination of the obligation or of its performance by the injured State may be of little value to it as a remedy. Its primary interest may be in the restoration of the legal relationship by cessation and reparation.

⁷⁰⁵ Cf., Vienna Convention, *ibid.*, art. 73.

⁷⁰⁶ The notion of “integral” obligations was developed by Fitzmaurice as Special Rapporteur on the Law of Treaties: see *Yearbook ... 1957*, vol. II, p. 54. The term has sometimes given rise to confusion, being used to refer to human rights or environmental obligations which are not owed on an “all or nothing” basis. The term “interdependent obligations” may be more appropriate.

(6) Pursuant to subparagraph (a) of article 42, a State is “injured” if the obligation breached was owed to it individually. The expression “individually” indicates that in the circumstances, performance of the obligation was owed to that State. This will necessarily be true of an obligation arising under a bilateral treaty between the two States parties to it, but it will also be true in other cases, e.g. of a unilateral commitment made by one State to another. It may be the case under a rule of general international law: thus, for example, rules concerning the non-navigational uses of an international river which may give rise to individual obligations as between one riparian State and another. Or it may be true under a multilateral treaty where particular performance is incumbent under the treaty as between one State party and another. For example, the obligation of the receiving State under article 22 of the Vienna Convention on Diplomatic Relations⁷⁰⁷ to protect the premises of a mission is owed to the sending State. Such cases are to be contrasted with situations where performance of the obligation is owed generally to the parties to the treaty at the same time and is not differentiated or individualized. It will be a matter for the interpretation and application of the primary rule to determine into which of the categories an obligation comes. The following discussion is illustrative only.

(7) An obvious example of cases coming within the scope of subparagraph (a) is a bilateral treaty relationship. If one State violates an obligation the performance of which is owed specifically to another State, the latter is an “injured State” in the sense of article 42. Other examples include binding unilateral acts by which one State assumes an obligation vis-à-vis another State; or the case of a treaty establishing obligations owed to a third State not party to the treaty.⁷⁰⁸ If it is established that the beneficiaries of the promise or the stipulation in favour of a third State were intended to acquire actual rights to performance of the obligation in question, they will be injured by its breach. Another example is a binding judgment of an international court or tribunal imposing obligations on one State party to the litigation for the benefit of the other party.⁷⁰⁹

⁷⁰⁷ Vienna Convention on Diplomatic Relations, United Nations, *Treaty Series*, vol. 500, p. 95.

⁷⁰⁸ Cf. Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 36.

⁷⁰⁹ See e.g. art. 59 of the Statute of the International Court of Justice.

(8) In addition, subparagraph (a) is intended to cover cases where the performance of an obligation under a multilateral treaty or customary international law is owed to one particular State. The scope of subparagraph (a) in this respect is different from that of article 60 (1) of the Vienna Convention on the Law of Treaties, which relies on the formal criterion of bilateral as compared with multilateral treaties. But although a multilateral treaty will characteristically establish a framework of rules applicable to all the States parties, in certain cases its performance in a given situation involves a relationship of a bilateral character between two parties. Multilateral treaties of this kind have often been referred to as giving rise to “bundles of bilateral relations”.⁷¹⁰

(9) The identification of one particular State as injured by a breach of an obligation under the Vienna Convention on Diplomatic Relations does not exclude that all States parties may have an interest of a general character in compliance with international law and in the continuation of international institutions and arrangements which have been built up over the years. In the *Diplomatic and Consular Staff* case, after referring to the “fundamentally unlawful character” of Iran’s conduct in participating in the detention of the diplomatic and consular personnel, the Court drew ...

“the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the

⁷¹⁰ See e.g. K. Sachariew, “State Responsibility for Multilateral Treaty Violations: Identifying the ‘Injured State’ and its Legal Status”, *Netherlands International Law Review*, vol. 35 (1988), p. 273, at pp. 277-8; B. Simma, “Bilateralism and Community Interest in the Law of State Responsibility”, in Y. Dinstein (ed.), *International Law in a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (London, Nijhoff, 1989), p. 821, at p. 823; C. Annacker, “The Legal Régime of *Erga Omnes* Obligations”, *Austrian Journal of Public International Law*, vol. 46 (1993-94), p. 131, at p. 136; D.N. Hutchinson, “Solidarity and Breaches of Multilateral Treaties”, *B.Y.I.L.*, vol. 59 (1988), p. 151, at pp. 154-5.

present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.”⁷¹¹

(10) Although discussion of multilateral obligations has generally focused on those arising under multilateral treaties, similar considerations apply to obligations under rules of customary international law. For example, the rules of general international law governing the diplomatic or consular relations between States establish bilateral relations between particular receiving and sending States, and violations of these obligations by a particular receiving State injure the sending State to whom performance was owed in the specific case.

(11) Subparagraph (b) deals with injury arising from violations of collective obligations, i.e. obligations that apply between more than two States and whose performance in the given case is not owed to one State individually, but to a group of States or even the international community as a whole. The violation of these obligations only injures any particular State if additional requirements are met. In using the expression “group of States”, article 42 (b) does not imply that the group has any separate existence or that it has separate legal personality. Rather the term is intended to refer to a group of States, consisting of all or a considerable number of States in the world or in a given region, which have combined to achieve some collective purpose and which may be considered for that purpose as making up a community of States of a functional character.

(12) Subparagraph (b) (i) stipulates that a State is injured if it is “specially affected” by the violation of a collective obligation. The term “specially affected” is taken from article 60 (2) (b) of the Vienna Convention on the Law of Treaties. Even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States. For example a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the States parties to the 1982 Convention in the preservation of the marine

⁷¹¹ *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at p. 43, para. 92.

environment, those coastal States parties should be considered as injured by the breach. Like article 60 (2) (b) of the Vienna Convention, subparagraph (b) (i) does not define the nature or extent of the special impact that a State must have sustained in order to be considered “injured”. This will have to be assessed on a case by case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a State to be considered injured it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.

(13) In contrast, subparagraph (b) (ii) deals with a special category of obligations, breach of which must be considered as affecting per se every other State to which the obligation is owed. Article 60 (2) (c) of the Vienna Convention on the Law of Treaties recognizes an analogous category of treaties, viz., those “of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations”. Examples include a disarmament treaty,⁷¹² a nuclear free zone treaty, or any other treaty where each parties’ performance is effectively conditioned upon and requires the performance of each of the others. Under article 60 (2) (c), any State party to such a treaty may terminate or suspend it in its relations not merely with the responsible State but generally in its relations with all the other parties.

(14) Essentially the same considerations apply to obligations of this character for the purposes of State responsibility. The other States parties may have no interest in termination or suspension of such obligations as distinct from continued performance, and they must all be considered as individually entitled to react to a breach. This is so whether or not any one of them is particularly affected; indeed they may all be equally affected, and none may have suffered quantifiable damage for the purposes of article 36. They may nonetheless have a strong interest in cessation and in other aspects of reparation, in particular restitution. For example, if one State party to the Antarctic Treaty claims sovereignty over an unclaimed area of Antarctica contrary to article 4 of that Treaty, the other States parties should be considered as injured thereby and as entitled to seek cessation, restitution (in the form of the annulment of the claim) and assurances of non-repetition in accordance with Part Two.

⁷¹² The example given in the Commission’s commentary to what became art. 60: *Yearbook ... 1966*, vol. II, p. 255, para. (8).

(15) The Articles deal with obligations arising under international law from whatever source and are not confined to treaty obligations. In practice interdependent obligations covered by subparagraph (b) (ii) will usually arise under treaties establishing particular regimes. Even under such treaties it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other States involved, and it is desirable that this subparagraph be narrow in its scope. Accordingly a State is only considered injured under subparagraph (b) (ii) if the breach is of such a character as radically to affect the enjoyment of the rights or the performance of the obligations of all the other States to which the obligation is owed.

Article 43

Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.
2. The injured State may specify in particular:
 - (a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
 - (b) What form reparation should take in accordance with the provisions of Part Two.

Commentary

- (1) Article 43 concerns the modalities to be observed by an injured State in invoking the responsibility of another State. The article applies to the injured State as defined in article 42, but States invoking responsibility under article 48 must also comply with its requirements.⁷¹³
- (2) Although State responsibility arises by operation of law on the commission of an internationally wrongful act by a State, in practice it is necessary for an injured State and/or other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation through formal protest, consultations, etc. Moreover the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or acquiescence: this is dealt with in article 45.

⁷¹³ See article 48 (3) and commentary.

(3) Article 43 requires an injured State which wishes to invoke the responsibility of another State to give notice of its claim to that State. It is analogous to article 65 of the Vienna Convention on the Law of Treaties.⁷¹⁴ Notice under article 43 need not be in writing, nor is it a condition for the operation of the obligation to provide reparation. Moreover, the requirement of notification of the claim does not imply that the normal consequence of the non-performance of an international obligation is the lodging of a statement of claim. Nonetheless an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

(4) It is not the function of the Articles to specify in detail the form which an invocation of responsibility should take. In practice claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. In *Certain Phosphate Lands in Nauru*, Australia argued that Nauru's claim was inadmissible because it had "not been submitted within a reasonable time".⁷¹⁵ The Court referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to press reports that the claim had been mentioned by the new President of Nauru in his independence day speech, as well as, inferentially, in subsequent correspondence and discussions with Australian Ministers. However the Court also noted that ...

"It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to 'seek a sympathetic reconsideration of Nauru's position'." ⁷¹⁶

The Court summarized the communications between the parties as follows:

"The Court ... takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by

⁷¹⁴ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

⁷¹⁵ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, *I.C.J. Reports 1992*, p. 240, at p. 253, para. 31.

⁷¹⁶ *Ibid.*, at p. 254, para. 35.

Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time."⁷¹⁷

In the circumstances it was sufficient that the respondent State was aware of the claim as a result of communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence.

(5) When giving notice of a claim, an injured or interested State will normally specify what conduct in its view is required of the responsible State by way of cessation of any continuing wrongful act, and what form any reparation should take. Thus Subparagraph 2 (a) provides that the injured State may indicate to the responsible State what should be done in order to cease the wrongful act, if it is continuing. This indication is not, as such, binding on the responsible State. The injured State can only require the responsible State to comply with its obligations, and the legal consequences of an internationally wrongful act are not for the injured State to stipulate or define. But it may be helpful to the responsible State to know what would satisfy the injured State; this may facilitate the resolution of the dispute.

(6) Subparagraph 2 (b) deals with the question of the election of the form of reparation by the injured State. In general, an injured State is entitled to elect as between the available forms of reparation. Thus it may prefer compensation to the possibility of restitution, as Germany did in the *Factory at Chorzów* case,⁷¹⁸ or as Finland eventually chose to do in its settlement of the *Passage through the Great Belt* case.⁷¹⁹ Or it may content itself with declaratory relief,

⁷¹⁷ Ibid., at pp. 254-255, para. 36.

⁷¹⁸ As the Permanent Court noted in the *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, at p. 17, by that stage of the dispute, Germany was no longer seeking on behalf of the German companies concerned the return of the factory in question or of its contents.

⁷¹⁹ In the *Passage through the Great Belt (Finland v. Denmark), Provisional Measures, I.C.J. Reports 1991*, p. 12, the International Court did not accept Denmark's argument as to the impossibility of restitution if, on the merits, it was found that the construction of the bridge across the Great Belt would result in a violation of Denmark's international obligations. For the terms of the eventual settlement see M. Koskenniemi, "L'affaire du passage par le Grand-Belt", *A.F.D.I.*, vol. XXXVIII (1992), p. 905, at p. 940.

generally or in relation to a particular aspect of its claim. On the other hand, there are cases where a State may not, as it were, pocket compensation and walk away from an unresolved situation, for example one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. In particular, in so far as there are continuing obligations the performance of which are not simply matters for the two States concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations to a larger group of States or to the international community as a whole.

(7) In light of these limitations on the capacity of the injured State to elect the preferred form of reparation, article 43 does not set forth the right of election in an absolute form. Instead it provides guidance to an injured State as to what sort of information it may include in its notification of the claim or in subsequent communications.

Article 44

Admissibility of claims

The responsibility of a State may not be invoked if:

- (a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;
- (b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Commentary

(1) The present Articles are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals. Rather they define the conditions for establishing the international responsibility of a State and for the invocation of that responsibility by another State or States. Thus it is not the function of the Articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as litispendence or election as they may affect the jurisdiction of

one international tribunal vis-à-vis another.⁷²⁰ By contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place. Two such matters are dealt with in article 44: the requirements of nationality of claims and exhaustion of local remedies.

(2) Subparagraph (a) provides that the responsibility of a State may not be invoked other than in accordance with any applicable rule relating to the nationality of claims. As the Permanent Court said in the *Mavrommatis Palestine Concessions* case ...

“It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.”⁷²¹

Paragraph (a) does not attempt a detailed elaboration of the nationality of claims rule or of the exceptions to it. Rather, it makes it clear that the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable.⁷²²

(3) Subparagraph (b) provides that when the claim is one to which the rule of exhaustion of local remedies applies, the claim is inadmissible if any available and effective local remedy has not been exhausted. The paragraph is formulated in general terms in order to cover any case to which the exhaustion of local remedies rule applies, whether under treaty or general international law, and in spheres not necessarily limited to diplomatic protection.

⁷²⁰ For discussion of the range of considerations affecting jurisdiction and admissibility of international claims before courts see G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris, Pedone, 1967); G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, Grotius, 1986), vol. II, pp. 427-575; S. Rosenne, *The Law and Practice of the International Court, 1920-1996* (3rd edn.) (The Hague, Nijhoff, 1997), vol. II, “Jurisdiction”.

⁷²¹ 1924, *P.C.I.J., Series A, No. 2*, p. 12.

⁷²² Questions of nationality of claims will be dealt with in detail in the International Law Commission’s work on diplomatic protection. See first report of the Special Rapporteur for the topic “Diplomatic protection”, A/CN.4/506.

(4) The local remedies rule was described by a Chamber of the Court in the *ELSI* case as “an important principle of customary international law”.⁷²³ In the context of a claim brought on behalf of a corporation of the claimant State, the Chamber defined the rule succinctly in the following terms:

“for an international claim [sc. on behalf of individual nationals or corporations] to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success”.⁷²⁴

The Chamber thus treated the exhaustion of local remedies as being distinct, in principle, from “the merits of the case”.⁷²⁵

(5) Only those local remedies which are “available and effective” have to be exhausted before invoking the responsibility of a State. The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the

⁷²³ *Elettronica Sicula S.p.A. (ELSI)*, I.C.J. Reports 1989, p. 15, at p. 42, para. 50. See also *Interhandel, Preliminary Objections*, I.C.J. Reports 1959, p. 6, at p. 27. On the exhaustion of local remedies rule generally, see e.g. C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990); J. Chappez, *La règle de l'épuisement des voies de recours internes* (Paris, Pedone, 1972); K. Doebling, “Local Remedies, Exhaustion of”, in *Encyclopedia of Public International Law*, (R. Bernhardt, ed.) (Amsterdam, North Holland, 1995), vol. 3, pp. 238-242; G. Perrin, “La naissance de la responsabilité internationale et l'épuisement des voies de recours internes dans le projet d'articles de la C.D.I.”, *Festschrift für R. Bindstedt* (Bern, Stämpfli, 1980), p. 271. On the exhaustion of local remedies rule in relation to violations of human rights obligations, see e.g. A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge, Cambridge University Press, 1983); E. Wyler, *L'illicite et la condition des personnes privées* (Paris, Pedone, 1995), pp. 65-89.

⁷²⁴ *Elettronica Sicula*, I.C.J. Reports 1989, p. 15, at p. 46, para. 59.

⁷²⁵ *Ibid.*, at p. 48, para. 63.

local court would have to apply can lead only to the rejection of any appeal. Beyond this, article 44 (b) does not attempt to spell out comprehensively the scope and content of the exhaustion of local remedies rule, leaving this to the applicable rules of international law.⁷²⁶

Article 45

Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

- (a) The injured State has validly waived the claim;
- (b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Commentary

(1) Article 45 is analogous to article 45 of the Vienna Convention on the Law of Treaties concerning loss of the right to invoke a ground for invalidating or terminating a treaty. The article deals with two situations in which the right of an injured State or other States concerned to invoke the responsibility of a wrongdoing State may be lost: waiver and acquiescence in the lapse of the claim. In this regard the position of an injured State as referred to in article 42 and other States concerned with a breach needs to be distinguished. A valid waiver or settlement of the responsibility dispute between the responsible State and the injured State, or, if there is more than one, all the injured States, may preclude any claim for reparation. Positions taken by individual States referred to in article 48 will not have such an effect.

(2) Subparagraph (a) deals with the case where an the injured State has waived either the breach itself, or its consequences in terms of responsibility. This is a manifestation of the general principle of consent in relation to rights or obligations within the dispensation of a particular State.

(3) In some cases, the waiver may apply only to one aspect of the legal relationship between the injured State and the responsible State. For example, in the *Russian Indemnity* case, the Russian embassy had repeatedly demanded from Turkey a certain sum corresponding to the

⁷²⁶ The topic will be dealt with in detail in the International Law Commission's work on diplomatic protection. See Second report of the Special Rapporteur for the topic "Diplomatic protection", A/CN.4/514.

capital amount of a loan, without any reference to interest or damages for delay. Turkey having paid the sum demanded, the Tribunal held that this conduct amounted to the abandonment of any other claim arising from the loan.⁷²⁷

(4) A waiver is only effective if it is validly given. As with other manifestations of State consent, questions of validity can arise with respect to a waiver, for example, possible coercion of the State or its representative, or a material error as to the facts of the matter, arising perhaps from a misrepresentation of those facts by the responsible State. The use of the term “valid waiver” is intended to leave to the general law the question of what amounts to a valid waiver in the circumstances.⁷²⁸ Of particular significance in this respect is the question of consent given by an injured State following a breach of an obligation arising from a peremptory norm of general international law, especially one to which article 40 applies. Since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law.

(5) Although it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal. In *Certain Phosphate Lands in Nauru*, it was argued that the Nauruan authorities before independence had waived the rehabilitation claim by concluding an Agreement relating to the future of the phosphate industry as well as by statements made at the time of independence. As to the former, the record of negotiations showed that the question of waiving the rehabilitation claim had been raised and not accepted, and the Agreement itself was silent on the point. As to the latter, the relevant statements were unclear and equivocal. The Court held there had been no waiver, since the conduct in question “did not at any time effect a clear and unequivocal waiver of their claims”.⁷²⁹

⁷²⁷ *UNRIAA*, vol. XI, p. 421 (1912), at p. 446.

⁷²⁸ Cf. the position with respect to valid consent under article 20: see commentary to article 20, paras. (4)-(8).

⁷²⁹ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, *I.C.J. Reports 1992*, p. 240, at p. 247, para. 13.

In particular the statements relied on “[n]otwithstanding some ambiguity in the wording ... did not imply any departure from the point of view expressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations”.⁷³⁰

(6) Just as it may explicitly waive the right to invoke responsibility, so an injured State may acquiesce in the loss of that right. Subparagraph (b) deals with the case where an injured State is to be considered as having by reason of its conduct validly acquiesced in the lapse of the claim. The article emphasizes *conduct* of the State, which could include, where applicable, unreasonable delay, as the determining criterion for the lapse of the claim. Mere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particular where the injured State does everything it can reasonably do to maintain its claim.

(7) The principle that a State may by acquiescence lose its right to invoke responsibility was endorsed by the International Court in *Certain Phosphate Lands in Nauru*, in the following passage:

“The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.”⁷³¹

In the *LaGrand* case, the International Court held the German application admissible even though Germany had taken legal action some years after the breach had become known to it.⁷³²

(8) One concern of the rules relating to delay is that additional difficulties may be caused to the respondent State due to the lapse of time, e.g., as concerns the collection and presentation of evidence. Thus in the *Stevenson* case and the *Gentini* case, considerations of procedural fairness

⁷³⁰ Ibid., at p. 250, para. 20.

⁷³¹ Ibid., at pp. 253-254, para. 32. The Court went on to hold that, in the circumstances of the case and having regard to the history of the matter, Nauru’s application was not inadmissible on this ground: *ibid.*, para. 36. It reserved for the merits any question of prejudice to the Respondent State by reason of the delay. See further commentary to article 13, para. (8).

⁷³² See *LaGrand (Germany v. United States of America), Provisional Measures*, *I.C.J. Reports 1999*, p. 9, and *LaGrand (Germany v. United States of America), Merits*, judgement of 27 June 2001, paras. 53-57.

to the respondent State were advanced.⁷³³ In contrast, the plea of delay has been rejected if, in the circumstances of a case, the respondent State could not establish the existence of any prejudice on its part, as where it has always had notice of the claim and was in a position to collect and preserve evidence relating to it.⁷³⁴

(9) Moreover, contrary to what may be suggested by the expression “delay”, international courts have not engaged simply in measuring the lapse of time and applying clear-cut time limits. No generally accepted time limit, expressed in terms of years has been laid down.⁷³⁵ The Swiss Federal Department in 1970 suggested a period of 20 to 30 years since the coming into existence of the claim.⁷³⁶ Others have stated that the requirements were more exacting for contractual claims than for non-contractual claims.⁷³⁷ None of the attempts to establish any precise or finite time limit for international claims in general has achieved acceptance.⁷³⁸ It would be very difficult to establish any single limit, given the variety of situations, obligations and conduct that may be involved.

⁷³³ See *Stevenson, UNRIAA*, vol. IX, p. 385 (1903); *Gentini*, *ibid.*, vol. X, p. 557 (1903).

⁷³⁴ See, e.g., *Tagliaferro*, *ibid.*, vol. X, p. 592 (1903), at p. 593; similarly the actual decision in *Stevenson*, *ibid.*, vol. IX, p. 385 (1903), at pp. 386-387.

⁷³⁵ In some cases time limits are laid down for specific categories of claims arising under specific treaties (e.g., the six-month time limit for individual applications under article 35 (1) of the European Convention on Human Rights) notably in the area of private law (e.g., in the field of commercial transactions and international transport). See United Nations Convention on the Limitation Period in the International Sale of Goods, New York, 14 June 1974, as amended by the Protocol of 11 April 1980: United Nations, *Treaty Series*, vol. 1511, p. 99. By contrast it is highly unusual for treaty provisions dealing with inter-State claims to be subject to any express time limits.

⁷³⁶ Communiqué of 29 December 1970, in *Schweizerisches Jahrbuch für Internationales Recht*, vol. 32 (1976), p. 153.

⁷³⁷ C. Fleischhauer, “Prescription”, in *Encyclopedia of Public International Law*, (R. Bernhardt, ed.) (Amsterdam, North Holland, 1995), vol. 3, p. 1105, at p. 1107.

⁷³⁸ A large number of international decisions stress the absence of general rules, and in particular of any specific limitation period measured in years. Rather the principle of delay is a matter of appreciation having regard to the facts of the given case. Besides *Certain Phosphate Lands in Nauru*, see e.g. *Gentini, UNRIAA*, vol. X, p. 551 (1903), at p. 561; the *Ambatielos* arbitration, (1956) *I.L.R.*, vol. 23, p. 306, at pp. 314-317.

(10) Once a claim has been notified to the respondent State, delay in its prosecution (e.g., before an international tribunal) will not usually be regarded as rendering it inadmissible.⁷³⁹ Thus in *Certain Phosphate Lands in Nauru*, the International Court held it to be sufficient that Nauru had referred to its claims in bilateral negotiations with Australia in the period preceding the formal institution of legal proceedings in 1989.⁷⁴⁰ In the *Tagliaferro* case, Umpire Ralston likewise held that despite the lapse of 31 years since the infliction of damage, the claim was admissible as it had been notified immediately after the injury had occurred.⁷⁴¹

(11) To summarize, a claim will not be inadmissible on grounds of delay unless the circumstances are such that the injured State should be considered as having acquiesced in the lapse of the claim or the respondent State has been seriously disadvantaged. International courts generally engage in a flexible weighing of relevant circumstances in the given case, taking into account such matters as the conduct of the respondent State and the importance of the rights involved. The decisive factor is whether the respondent State has suffered any prejudice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued. Even if there has been some prejudice, it may be able to be taken into account in determining the form or extent of reparation.⁷⁴²

Article 46

Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

⁷³⁹ For statements of the distinction between notice of claim and commencement of proceedings see, e.g., R. Jennings and A.D. Watts (eds.) *Oppenheim's International Law*, (9th edn.) (London, Longmans, 1992) vol. I, p. 527; C. Rousseau, *Droit international public* (Paris, Sirey, 1983), vol. V, p. 182.

⁷⁴⁰ *I.C.J. Reports 1992*, p. 240, at p. 250, para. 20.

⁷⁴¹ *Tagliaferro*, UNRIIAA., vol. X, p. 592 (1903), at p. 593.

⁷⁴² See article 39 and commentary.

Commentary

- (1) Article 46 deals with the situation of a plurality of injured States, in the sense defined in article 42. It states the principle that where there are several injured States, each of them may separately invoke the responsibility for the internationally wrongful act on its own account.
- (2) Several States may qualify as “injured” States under article 42. For example, all the States to which an interdependent obligation is owed within the meaning of article 42 (b) (ii) are injured by its breach. In a situation of a plurality of injured States each may seek cessation of the wrongful act if it is continuing, and claim reparation in respect of the injury to itself. This conclusion has never been doubted, and is implicit in the terms of article 42 itself.
- (3) It is by no means unusual for claims arising from the same internationally wrongful act to be brought by several States. For example in *The S.S. Wimbledon*, four States brought proceedings before the Permanent Court of International Justice under article 386 (1) of the Treaty of Versailles, which allowed “any interested Power” to apply in the event of a violation of the provisions of the Treaty concerning transit through the Kiel Canal. The Court noted that “each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags”. It held they were each covered by article 386 (1) “even though they may be unable to adduce a prejudice to any pecuniary interest”.⁷⁴³ In fact only France, representing the operator of the vessel, claimed and was awarded compensation. In the cases concerning the *Aerial Incident of 27 July 1955*, proceedings were commenced by the United States, the United Kingdom and Israel against Bulgaria concerning the destruction of an Israeli civil aircraft and the loss of lives involved.⁷⁴⁴ In the *Nuclear Tests* cases, Australia and New Zealand each claimed to be injured in various ways by the French conduct of atmospheric nuclear tests at Muraroa Atoll.⁷⁴⁵

⁷⁴³ 1923, *P.C.I.J., Series A, No. 1* at p. 20

⁷⁴⁴ The Court held that it lacked jurisdiction over the Israeli claim: *I.C.J. Reports 1959*, p. 127 after which the United Kingdom and United States claims were withdrawn. In its Memorial, Israel noted that there had been active coordination of the claims between the various claimant governments, and added: “One of the primary reasons for establishing coordination of this character from the earliest stage was to prevent, as far as possible, the Bulgarian Government being faced with double claims leading to the possibility of double damages.” *Aerial Incident of 27 July 1955. Pleadings, Oral Arguments, Documents*, p. 106.

⁷⁴⁵ See *Nuclear Tests (Australia v. France)*, *I.C.J. Reports 1974*, p. 253 at p. 256; *Nuclear Tests (New Zealand v. France)*, *I.C.J. Reports 1974*, p. 457 at p. 460.

(4) Where the States concerned do not claim compensation on their own account as distinct from a declaration of the legal situation, it may not be clear whether they are claiming as injured States or as States invoking responsibility in the common or general interest under article 48. Indeed, in such cases it may not be necessary to decide into which category they fall, provided it is clear that they fall into one or the other. Where there is more than one injured State claiming compensation on its own account or on account of its nationals, evidently each State will be limited to the damage actually suffered. Circumstances might also arise in which several States injured by the same act made incompatible claims. For example, one State may claim restitution whereas the other may prefer compensation. If restitution is indivisible in such a case and the election of the second State is valid, it may be that compensation is appropriate in respect of both claims.⁷⁴⁶ In any event, two injured States each claiming in respect of the same wrongful act would be expected to coordinate their claims so as to avoid double recovery. As the International Court pointed out in the *Reparations* opinion, “International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case”.⁷⁴⁷

Article 47

Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.
2. Paragraph 1:
 - (a) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;
 - (b) Is without prejudice to any right of recourse against the other responsible States.

⁷⁴⁶ CF. *Forests of Central Rhodope*, where the arbitrator declined to award restitution *inter alia* on the ground that not all the persons or entities interested in restitution had claimed: *UNRIAA*, vol. 3 p. 1405 (1993), at p. 1432.

⁷⁴⁷ *I.C.J. Reports 1949*, p. 174 at p. 186.

Commentary

- (1) Article 47 deals with the situation where there is a plurality of responsible States in respect of the same wrongful act. It states the general principle that in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.
- (2) Several States may be responsible for the same internationally wrongful act in a range of circumstances. For example two or more States might combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation. In that case the injured State can hold each responsible State to account for the wrongful conduct as a whole. Or two States may act through a common organ which carries out the conduct in question, e.g. a joint authority responsible for the management of a boundary river. Or one State may direct and control another State in the commission of the same internationally wrongful act by the latter, such that both are responsible for the act.⁷⁴⁸
- (3) It is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as “joint”, “joint and several” and “solidary” responsibility derive from different legal traditions⁷⁴⁹ and analogies must be applied with care. In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.⁷⁵⁰ In the application of that principle, however, the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them. It is to such cases that article 47 is addressed.

⁷⁴⁸ See article 17 and commentary.

⁷⁴⁹ For a comparative survey of internal laws on solidary or joint liability see J.A. Weir, “Complex Liabilities” in A. Tunc (ed.), *International Encyclopedia of Comparative Law* (Tübingen, Mohr, 1983), vol. XI, Torts, esp. pp. 43-44, sections 79-81.

⁷⁵⁰ See introductory commentary to Part One, chapter IV, paras. (1)-(5).

(4) In the *Certain Phosphate Lands in Nauru* case,⁷⁵¹ Australia, the sole respondent, had administered Nauru as a trust territory under the Trusteeship Agreement on behalf of the three States concerned. Australia argued that it could not be sued alone by Nauru, but only jointly with the other two States concerned. Australia argued that the two States were necessary parties to the case and that in accordance with the principle formulated in *Monetary Gold*,⁷⁵² the claim against Australia alone was inadmissible. It also argued that the responsibility of the three States making up the Administering Authority was “solidary” and that a claim could not be made against only one of them. The Court rejected both arguments. On the question of “solidary” responsibility it said:

“... Australia has raised the question whether the liability of the three States would be ‘joint and several’ (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This ... is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.”⁷⁵³

The Court was careful to add that its decision on jurisdiction “does not settle the question whether reparation would be due from Australia, if found responsible, for the whole or only for

⁷⁵¹ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, *I.C.J. Reports 1992*, p. 240.

⁷⁵² *Monetary Gold Removed from Rome in 1943*, *I.C.J. Reports 1954*, p. 19. See further commentary to article 16, para. (11).

⁷⁵³ *Certain Phosphate Lands in Nauru*, *I.C.J. Reports 1992*, p. 240, at p. 258-259, para. 48.

part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems ... and, in particular, the special role played by Australia in the administration of the Territory”.⁷⁵⁴

(5) The extent of responsibility for conduct carried on by a number of States is sometimes addressed in treaties.⁷⁵⁵ A well-known example is the Convention on the International Liability for Damage caused by Space Objects of 29 March 1972.⁷⁵⁶ Article IV (1) provides expressly for “joint and several liability” where damage is suffered by a third State as a result of a collision between two space objects launched by two States. In some cases liability is strict; in others it is based on fault. Article IV (2) provides:

“In all cases of joint and several liability referred to in paragraph 1 ... the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.”⁷⁵⁷

⁷⁵⁴ Ibid., at p. 262, para. 56. The case was subsequently withdrawn by agreement, Australia agreeing to pay by instalments an amount corresponding to the full amount of Nauru’s claim. Subsequently, the two other Governments agreed to contribute to the payments made under the settlement. See *I.C.J. Reports 1993*, p. 322, and for the Settlement Agreement of 10 August 1993, see United Nations, *Treaty Series*, vol. 1770, p. 379.

⁷⁵⁵ A special case is the responsibility of the European Union and its member States under “mixed agreements”, where the Union and all or some members are parties in their own name. See e.g. Annex IX to the United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, United Nations, *Treaty Series*, vol. 1833, p. 396. Generally on mixed agreements, see, e.g., A. Rosas, “Mixed Union – Mixed Agreements”, in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (The Hague, Kluwer, 1998), p. 125.

⁷⁵⁶ United Nations, *Treaty Series*, vol. 961, p. 187.

⁷⁵⁷ See also art. V (2), which provides for indemnification between States which are jointly and severally liable.

This is clearly a *lex specialis*, and it concerns liability for lawful conduct rather than responsibility in the sense of the present Articles.⁷⁵⁸ At the same time it indicates what a regime of “joint and several” liability might amount to so far as an injured State is concerned.

(6) According to paragraph 1 of article 47, where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.

(7) Under article 47 (1), where several States are each responsible for the same internationally wrongful act, the responsibility of each may be separately invoked by an injured State in the sense of article 42. The consequences that flow from the wrongful act, for example in terms of reparation, will be those which flow from the provisions of Part Two in relation to that State.

(8) Article 47 only addresses the situation of a plurality of responsible States in relation to the same internationally wrongful act. The identification of such an act will depend on the particular primary obligation, and cannot be prescribed in the abstract. Of course situations can also arise where several States by separate internationally wrongful conduct have contributed to cause the same damage. For example, several States might contribute to polluting a river by the separate discharge of pollutants. In the *Corfu Channel* incident, it appears that Yugoslavia actually laid the mines and would have been responsible for the damage they caused. The International Court held that Albania was responsible to the United Kingdom for the same damage on the basis that it knew or should have known of the presence of the mines and of the attempt by the British ships to exercise their right of transit, but failed to warn the ships.⁷⁵⁹ Yet it was not suggested that Albania’s responsibility for failure to warn was reduced, let alone

⁷⁵⁸ See the introductory commentary, para. 4 for the distinction between international responsibility for wrongful acts and international liability arising from lawful conduct.

⁷⁵⁹ *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 4, at pp. 22-23.

precluded, by reason of the concurrent responsibility of a third State. In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.

(9) The general principle set out in paragraph 1 of article 47 is subject to the two provisos set out in paragraph 2. Subparagraph (a) addresses the question of double recovery by the injured State. It provides that the injured State may not recover, by way of compensation, more than the damage suffered.⁷⁶⁰ This provision is designed to protect the responsible States, whose obligation to compensate is limited by the damage suffered. The principle is only concerned to ensure against the actual recovery of more than the amount of the damage. It would not exclude simultaneous awards against two or more responsible States, but the award would be satisfied so far as the injured State is concerned by payment in full made by any one of them.

(10) The second proviso, in subparagraph (b), recognizes that where there is more than one responsible State in respect of the same injury, questions of contribution may arise between them. This is specifically envisaged, for example, in articles IV (2) and V (2) of the 1972 Outer Space Liability Convention.⁷⁶¹ On the other hand, there may be cases where recourse by one responsible State against another should not be allowed. Subparagraph (b) does not address the question of contribution among several States which are responsible for the same wrongful act; it merely provides that the general principle stated in paragraph 1 is without prejudice to any right of recourse which one responsible State may have against any other responsible State.

Article 48

Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

⁷⁶⁰ Such a principle was affirmed, for example, by the Permanent Court in *Factory at Chorzów*, when it held that a remedy sought by Germany could not be granted “or the same compensation would be awarded twice over”. *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17*, at p. 59; see also *ibid.*, at pp. 45, 49.

⁷⁶¹ Convention on the International Liability for Damage caused by Space Objects, United Nations, *Treaty Series*, vol. 961, p. 187.

(b) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Commentary

(1) Article 48 complements the rule contained in article 42. It deals with the invocation of responsibility by States other than the injured State acting in the collective interest. A State which is entitled to invoke responsibility under article 48 is acting not in its individual capacity by reason of having suffered injury but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole. The distinction is underlined by the phrase “[a]ny State other than an injured State” in paragraph 1 of article 48.

(2) Article 48 is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of article 42. Indeed in respect of obligations to the international community as a whole, the International Court specifically said as much in its judgment in the *Barcelona Traction* case.⁷⁶² Although the Court noted that “all States can be held to have a legal interest in” the fulfilment of these rights, article 48 refrains from qualifying the position of the States identified in article 48, for example by referring to them as “interested States”. The term “legal interest” would not permit a distinction between articles 42 and 48, as injured States in the sense of article 42 also have legal interests.

⁷⁶² *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33.

(3) As to the structure of article 48, paragraph 1 defines the categories of obligations which give rise to the wider right to invoke responsibility. Paragraph 2 stipulates which forms of responsibility States other than injured States may claim. Paragraph 3 applies the requirements of invocation contained in articles 43, 44 and 45 to cases where responsibility is invoked under article 48 (1).

(4) Paragraph 1 refers to “[a]ny State other than an injured State”. In the nature of things all or many States will be entitled to invoke responsibility under article 48, and the term “[a]ny State” is intended to avoid any implication that these States have to act together or in unison. Moreover their entitlement will coincide with that of any injured State in relation to the same internationally wrongful act in those cases where a State suffers individual injury from a breach of an obligation to which article 48 applies.

(5) Paragraph 1 defines the categories of obligations the breach of which may entitle States other than the injured State to invoke State responsibility. A distinction is drawn between obligations owed to a group of States and established to protect a collective interest of the group (subparagraph (1) (a)), and obligations owed to the international community as a whole (subparagraph (1) (b)).⁷⁶³

(6) Under subparagraph (1) (a), States other than the injured State may invoke responsibility if two conditions are met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the State invoking responsibility belongs; and second, the obligation must have been established for the protection of a collective interest. The provision does not distinguish between different sources of international law; obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. Such obligations have sometimes been referred to as “obligations *erga omnes partes*”.

(7) Obligations coming within the scope of subparagraph (1) (a) have to be “collective obligations”, i.e. they must apply between a group of States and have been established in some collective interest.⁷⁶⁴ They might concern, for example, the environment or security of a region (e.g. a regional nuclear free zone treaty or a regional system for the protection of human rights). They are not limited to arrangements established only in the interest of the member States but

⁷⁶³ For the extent of responsibility for serious breaches of obligations to the international community as a whole see Part Two, chapter III and commentary.

⁷⁶⁴ See also commentary to article 42, para. (11).

would extend to agreements established by a group of States in some wider common interest.⁷⁶⁵ But in any event the arrangement must transcend the sphere of bilateral relations of the States parties. As to the requirement that the obligation in question protect a collective interest, it is not the function of the Articles to provide an enumeration of such interests. If they fall within subparagraph (1) (a), their principal purpose will be to foster a common interest, over and above any interests of the States concerned individually. This would include situations in which States, attempting to set general standards of protection for a group or people, have assumed obligations protecting non-State entities.⁷⁶⁶

(8) Under subparagraph (1) (b), States other than the injured State may invoke responsibility if the obligation in question was owed “to the international community as a whole”.⁷⁶⁷ The provision intends to give effect to the International Court’s statement in the *Barcelona Traction* case, where the Court drew “an essential distinction” between obligations owed to particular States and those owed “towards the international community as a whole”.⁷⁶⁸ With regard to the latter, the Court went on to state that “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”.

(9) While taking up the essence of this statement, the Articles avoid use of the term “obligations *erga omnes*”, which conveys less information than the Court’s reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty. Nor is it the function of the Articles to provide a list of those obligations which under existing international law are owed to the international community as a

⁷⁶⁵ In the *S.S. Wimbledon*, the Court noted “[t]he intention of the authors of the Treaty of Versailles to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind”: 1928, *P.C.I.J., Series A, No. 1*, at p. 23.

⁷⁶⁶ Art. 22 of the League of Nations Covenant, establishing the Mandate system, was a provision in the general interest in this sense, as were each of the Mandate agreements concluded in accordance with it. Cf., however, the much-criticized decision of the International Court in *South West Africa, Second Phase*, *I.C.J. Reports 1966*, p. 6, from which article 48 is a deliberate departure.

⁷⁶⁷ For the terminology “international community as a whole” see commentary to article 25, para. (18).

⁷⁶⁸ *Barcelona Traction, Light and Power Company, Limited, Second Phase*, *I.C.J. Reports 1970*, p. 3, at p. 32, para. 33, and see commentary to Part Two, chapter III, paras. (2)-(6).

whole. This would go well beyond the task of codifying the secondary rules of State responsibility, and in any event, such a list would be only of limited value, as the scope of the concept will necessarily evolve over time. The Court itself has given useful guidance: in its 1970 judgment it referred by way of example to “the outlawing of acts of aggression, and of genocide” and to “the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.⁷⁶⁹ In its judgment in the *East Timor* case, the Court added the right of self-determination of peoples to this list.⁷⁷⁰

(10) Each State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations. Whereas the category of collective obligations covered by subparagraph (1) (a) needs to be further qualified by the insertion of additional criteria, no such qualifications are necessary in the case of subparagraph (1) (b). All States are by definition members of the international community as a whole, and the obligations in question are by definition collective obligations protecting interests of the international community as such. Of course such obligations may at the same time protect the individual interests of States, as the prohibition of acts of aggression protects the survival of each State and the security of its people. Similarly, individual States may be specially affected by the breach of such an obligation, for example a coastal State specially affected by pollution in breach of an obligation aimed at protection of the marine environment in the collective interest.

(11) Paragraph 2 specifies the categories of claim which States may make when invoking responsibility under article 48. The list given in the paragraph is exhaustive, and invocation of responsibility under article 48 gives rise to a more limited range of rights as compared to those of injured States under article 42. In particular, the focus of action by a State under article 48 - such State not being injured in its own right and therefore not claiming compensation on its own account - is likely to be on the very question whether a State is in breach and on cessation if the breach is a continuing one. For example in *The S.S. Wimbledon*, Japan which had no economic interest in the particular voyage sought only a declaration, whereas France, whose national had

⁷⁶⁹ Ibid., at p. 32, para. 34.

⁷⁷⁰ *I.C.J. Reports 1995*, p. 90, at p. 102, para. 29.

to bear the loss, sought and was awarded damages.⁷⁷¹ In the *South West Africa* cases, Ethiopia and Liberia sought only declarations of the legal position.⁷⁷² In that case, as the Court itself pointed out in 1971, “the injured entity” was a people, viz. the people of South West Africa.⁷⁷³

(12) Under paragraph 2 (a), any State referred to in article 48 is entitled to request cessation of the wrongful act and, if the circumstances require assurances and guarantees of non-repetition under article 30. In addition, subparagraph 2 (b) allows such a State to claim from the responsible State reparation in accordance with the provisions of chapter II of Part Two. In case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution. In accordance with subparagraph 2 (b), such a claim must be made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached. This aspect of article 48 (2) involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake. In this context it may be noted that certain provisions, for example in various human rights treaties, allow invocation of responsibility by any State party. In those cases where they have been resorted to, a clear distinction has been drawn between the capacity of the applicant State to raise the matter and the interests of the beneficiaries of the obligation.⁷⁷⁴ Thus a State invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party. Where the injured party is a State, its government will be able authoritatively to represent that interest. Other cases may present greater difficulties, which the present Articles cannot solve.⁷⁷⁵ Paragraph 2 (b) can do no more than set out the general principle.

⁷⁷¹ 1928, *P.C.I.J., Series A, No. 1*, at p. 30.

⁷⁷² *South West Africa, Preliminary Objections, I.C.J. Reports 1962*, p. 319; *South West Africa, Second Phase, I.C.J. Reports 1966*, p. 6.

⁷⁷³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *I.C.J. Reports 1971*, p. 12, at p. 56, para. 127.

⁷⁷⁴ See e.g. the observations of the European Court of Human Rights in *Denmark v. Turkey, Friendly Settlement*, judgment of 5 April 2000, paras. 20, 23.

⁷⁷⁵ See also commentary to article 33, paras. (3)-(4).

(13) Subparagraph 2 (b) refers to the State claiming “[p]erformance of the obligation of reparation in accordance with the preceding articles”. This makes it clear that article 48 States may not demand reparation in situations where an injured State could not do so. For example a demand for cessation presupposes the continuation of the wrongful act; a demand for restitution is excluded if restitution itself has become impossible.

(14) Paragraph 3 subjects the invocation of State responsibility by States other than the injured State to the conditions that govern invocation by an injured State, specifically article 43 (notice of claim), 44 (admissibility of claims) and 45 (loss of the right to invoke responsibility). These articles are to be read as applicable equally, *mutatis mutandis*, to a State invoking responsibility under article 48.

Chapter II

Countermeasures

(1) This chapter deals with the conditions and limitations on the taking of countermeasures by an injured State. In other words, it deals with measures, which would otherwise be contrary to the international obligations of an injured State vis-à-vis the responsible State. They were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation. Countermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.

(2) It is recognized both by governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances.⁷⁷⁶ This is reflected in article 23 which deals with countermeasures in response to an internationally wrongful act in the context of the circumstances precluding wrongfulness. Like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States.

Chapter II has as its aim to establish an operational system, taking into account the exceptional

⁷⁷⁶ For the substantial literature see the bibliographies in E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, N.Y., Transnational Publishers, 1984), pp. 179-189; O.Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford, Clarendon Press, 1988), pp. 37-41; L-A. Sicilianos, *Les réactions décentralisées à l'illicite* (Paris, L.D.G.J., 1990) pp. 501-525. P. Alland, *Justice privée et ordre juridique international: Etude théorique des contre-mesures au droit international publique*, (Paris, Pedone, 1994).

character of countermeasures as a response to internationally wrongful conduct. At the same time, it seeks to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds.

(3) As to terminology, traditionally the term “reprisals” was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach.⁷⁷⁷ More recently the term “reprisals” has been limited to action taken in time of international armed conflict; i.e., it has been taken as equivalent to belligerent reprisals. The term “countermeasures” covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter.⁷⁷⁸ Countermeasures are to be contrasted with retorsion, i.e. “unfriendly” conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act. Acts of retorsion may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargos of various kinds or withdrawal of voluntary aid programs. Whatever their motivation, so long as such acts are not incompatible with the international obligations of the States taking them towards the target State, they do not involve countermeasures and they fall outside the scope of the present Articles. The term “sanction” is also often used as equivalent to action taken against a State by a group of States or mandated by an international organization. But the term is imprecise: Chapter VII of the United Nations Charter refers only to “measures”, even though these can encompass a very wide range of acts, including the use of armed force.⁷⁷⁹ Questions concerning the use of force in international relations and of the legality of belligerent reprisals are governed by the relevant primary rules. On the other hand the Articles are concerned with countermeasures as referred to

⁷⁷⁷ See, e.g., E. de Vattel, *Le droit des gens ou principes de la loi naturelle* (1758, repr. Washington, Carnegie Institution, 1916), Bk. II, ch. XVIII, section 342.

⁷⁷⁸ See *Air Services Agreement of 27 March 1946 (United States v. France)*, UNRIIAA, vol. XVIII, p. 416 (1979), at p. 416, para. 80; *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, p. 3, at p. 27, para. 53; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14, at p. 102, para. 201; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, at p. 55, para. 82.

⁷⁷⁹ Charter of the United Nations, Arts. 39, 41, 42.

in article 23. They are taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two. They are instrumental in character and are appropriately dealt with in Part Three as an aspect of the implementation of State responsibility.

(4) Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the Vienna Convention on the Law of Treaties. Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach.⁷⁸⁰ Countermeasures involve conduct taken in derogation from a subsisting treaty obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved.

(5) This chapter does not draw any distinction between what are sometimes called “reciprocal countermeasures” and other measures. That term refers to countermeasures which involve suspension of performance of obligations towards the responsible State “if such obligations correspond to, or are directly connected with, the obligation breached”.⁷⁸¹ There is no requirement that States taking countermeasures are limited to suspension of performance of the same or a closely related obligation.⁷⁸² A number of considerations support this conclusion. First, for some obligations, for example those concerning the protection of human rights, reciprocal countermeasures are inconceivable. The obligations in question have a non-reciprocal character and are not only due to other States but to the individuals themselves.⁷⁸³ Secondly, a limitation to reciprocal countermeasures assumes that the injured State will be in a position to impose the same or related measures as the responsible State, which may not be so.

⁷⁸⁰ Cf. Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, arts. 70, 73, and on the respective scope of the codified law of treaties and the law of State responsibility see introductory commentary to Part One, chapter V, paras. (3)-(7).

⁷⁸¹ See *Yearbook ... 1985*, vol. II, Part 1, p. 10.

⁷⁸² Contrast the exception of non-performance in the law of treaties, which is so limited: see introductory commentary to Part One, chapter V, para. (9).

⁷⁸³ Cf. *Ireland v. United Kingdom*, E.C.H.R., Ser. A No. 25 (1978).

The obligation may be a unilateral one or the injured State may already have performed its side of the bargain. Above all, considerations of good order and humanity preclude many measures of a reciprocal nature. This conclusion does not, however, end the matter. Countermeasures are more likely to satisfy the requirements of necessity and proportionality if they are taken in relation to the same or a closely related obligation, as in the *Air Services* arbitration.⁷⁸⁴

(6) This conclusion reinforces the need to ensure that countermeasures are strictly limited to the requirements of the situation and that there are adequate safeguards against abuse. Chapter II seeks to do this in a variety of ways. First, as already noted, it concerns only non-forcible countermeasures (article 50 (1) (a)). Secondly, countermeasures are limited by the requirement that they are directed at the responsible State and not at third parties (article 49 (1) and (2)). Thirdly, since countermeasures are intended as instrumental - in other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment - they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States (articles 49 (2) (3), 53). Fourthly, countermeasures must be proportionate (article 51). Fifthly, they must not involve any departure from certain basic obligations (article 50 (1)), in particular those under peremptory norms of general international law.

(7) This chapter also deals to some extent with the conditions of the implementation of countermeasures. In particular, countermeasures cannot affect any dispute settlement procedure which is in force between the two States and applicable to the dispute (article 50 (2) (a)). Nor can they be taken in such a way as to impair diplomatic or consular inviolability (article 50 (2) (b)). Countermeasures must be preceded by a demand by the injured State that the responsible State comply with its obligations under Part Two, must be accompanied by an offer to negotiate, and must be suspended if the internationally wrongful act has ceased and the dispute is submitted in good faith to a court or tribunal with the authority to make decisions binding on the parties (article 52 (3)).

(8) The focus of the chapter is on countermeasures taken by injured States as defined in article 42. Occasions have arisen in practice of countermeasures being taken by other States, in particular those identified in article 48, where no State is injured or else on behalf of and at the request of an injured State. Such cases are controversial and the practice is embryonic.

⁷⁸⁴ *UNRIAA*, vol. XVIII, p. 416 (1979).

This chapter does not purport to regulate the taking of countermeasures by States other than the injured State. It is, however, without prejudice to the right of any State identified in article 48 (1) to take lawful measures against a responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached (article 54).

(9) In common with other chapters of these Articles, the provisions on countermeasures are residual and may be excluded or modified by a special rule to the contrary (see article 55). Thus a treaty provision precluding the suspension of performance of an obligation under any circumstances will exclude countermeasures with respect to the performance of the obligation. Likewise a regime for dispute resolution to which States must resort in the event of a dispute, especially if (as with the WTO dispute settlement system) it requires an authorization to take measures in the nature of countermeasures in response to a proven breach.⁷⁸⁵

Article 49

Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Commentary

(1) Article 49 describes the permissible object of countermeasures taken by an injured State against the responsible State and places certain limits on their scope. Countermeasures may only be taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two, namely, to cease the internationally wrongful conduct, if it is

⁷⁸⁵ See WTO, Understanding on Rules and Procedures governing the Settlement of Disputes, arts. 1, 3 (7), 22.

continuing, and to provide reparation to the injured State.⁷⁸⁶ Countermeasures are not intended as a form of punishment for wrongful conduct but as an instrument for achieving compliance with the obligations of the responsible State under Part Two. The limited object and exceptional nature of countermeasures are indicated by the use of the word “only” in paragraph 1 of Article 49.

(2) A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the State taking the countermeasure. This point was clearly made by the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case, in the following passage:

“In order to be justifiable, a countermeasure must meet certain conditions ... In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State.”⁷⁸⁷

(3) Paragraph 1 of article 49 presupposes an objective standard for the taking of countermeasures, and in particular requires that the countermeasure be taken against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations of cessation and reparation. A State taking countermeasures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded. A State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own

⁷⁸⁶ For these obligations see articles 30 and 31 and commentaries.

⁷⁸⁷ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, at p. 55, para. 83. See also “*Naulilaa*” (*Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa*), UNRIIAA, vol. II, p. 1013 (1928), at p. 1027; “*Cysne*” (*Responsibility of Germany for acts committed subsequent to 31 July 1914 and before Portugal entered into the war*), *ibid.*, vol. II, p. 1035 (1930), at p. 1057. At the 1930 Hague Codification Conference, all States which responded on this point took the view that a prior wrongful act was an indispensable prerequisite for the adoption of reprisals; see League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (Doc. C.75.M.69.1929.V.), p. 128.

risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment.⁷⁸⁸ In this respect there is no difference between countermeasures and other circumstances precluding wrongfulness.⁷⁸⁹

(4) A second essential element of countermeasures is that they “must be directed against”⁷⁹⁰ a State which has committed an internationally wrongful act, and which has not complied with its obligations of cessation and reparation under Part Two of the present Articles.⁷⁹¹ The word “only” in paragraph 1 applies equally to the target of the countermeasures as to their purpose and is intended to convey that countermeasures may only be adopted against a State which is the author of the internationally wrongful act. Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third State. In that sense the effect of countermeasures in precluding wrongfulness is relative. It concerns the legal relations between the injured State and the responsible State.⁷⁹²

(5) This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties. For example, if the injured State suspends transit rights with the responsible State in accordance with this chapter, other parties, including third States, may be affected thereby. If they have no individual rights in the matter they cannot complain. Similarly

⁷⁸⁸ The Tribunal’s remark in the *Air Services* case, to the effect that “each State establishes for itself its legal situation vis-à-vis other States”, (*UNRIIA*, vol. XVIII, p. 416 (1979), at p. 443, para. 81) should not be interpreted in the sense that the United States would have been justified in taking countermeasures whether or not France was in breach of the Agreement. In that case the Tribunal went on to hold that the United States was actually responding to a breach of the Agreement by France, and that its response met the requirements for countermeasures under international law, in particular in terms of purpose and proportionality. The Tribunal did not decide that an unjustified belief by the United States as to the existence of a breach would have been sufficient.

⁷⁸⁹ See introductory commentary to Part One, chapter V, para. (8).

⁷⁹⁰ *Gabčíkovo-Nagymaros Project*, *I.C.J. Reports* 1997, p. 7, at pp. 55-56, para. 83.

⁷⁹¹ *Ibid.* In *Gabčíkovo-Nagymaros Project* the Court held that the requirement had been satisfied, in that Hungary was in continuing breach of its obligations under a bilateral treaty, and Czechoslovakia’s response was directed against it on that ground.

⁷⁹² On the specific question of human rights obligations see article 50 (1) (b) and commentary.

if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided.

(6) In taking countermeasures, the injured State effectively withholds performance for the time being of one or more international obligations owed by it to the responsible State, and paragraph 2 of article 49 reflects this element. Although countermeasures will normally take the form of the non-performance of a single obligation, it is possible that a particular measure may affect the performance of several obligations simultaneously. For this reason, paragraph 2 refers to “obligations” in the plural. For example, freezing of the assets of a State might involve what would otherwise be the breach of several obligations to that State under different agreements or arrangements. Different and coexisting obligations might be affected by the same act. The test is always that of proportionality, and a State which has committed an internationally wrongful act does not thereby make itself the target for any form or combination of countermeasures irrespective of their severity or consequences.⁷⁹³

(7) The phrase “for the time being” in paragraph 2 indicates the temporary or provisional character of countermeasures. Their aim is the restoration of a condition of legality as between the injured State and the responsible State, and not the creation of new situations which cannot be rectified whatever the response of the latter State to the claims against it.⁷⁹⁴ Countermeasures are taken as a form of inducement, not punishment: if they are effective in inducing the responsible State to comply with its obligations of cessation and reparation, they should be discontinued and performance of the obligation resumed.

(8) Paragraph 1 of article 49 refers to the obligations of the responsible State “under Part Two”. It is to ensuring the performance of these obligations that countermeasures are directed. In many cases the main focus of countermeasures will be to ensure cessation of a continuing wrongful act but they may also be taken to ensure reparation, provided the other conditions laid down in chapter II are satisfied. Any other conclusion would immunize from countermeasures a State responsible for an internationally wrongful act if the act had ceased,

⁷⁹³ See article 51 and commentary. In addition, the performance of certain obligations may not be withheld by way of countermeasures in any circumstances: see article 50 and commentary.

⁷⁹⁴ This notion is further emphasized by paragraph 3 and article 53 (termination of countermeasures).

irrespective of the seriousness of the breach or its consequences, or of the State's refusal to make reparation for it. In this context an issue arises whether countermeasures should be available where there is a failure to provide satisfaction as demanded by the injured State, given the subsidiary role this remedy plays in the spectrum of reparation.⁷⁹⁵ In normal situations, satisfaction will be symbolic or supplementary and it would be highly unlikely that a State which had ceased the wrongful act and tendered compensation to the injured State could properly be made the target of countermeasures for failing to provide satisfaction as well. This concern may be adequately addressed by the application of the notion of proportionality set out in article 51.⁷⁹⁶

(9) Paragraph 3 of article 49 is inspired by article 72 (2) of the Vienna Convention on the Law of Treaties, which provides that when a State suspends a treaty it must not, during the suspension, do anything to preclude the treaty from being brought back into force. By analogy, States should as far as possible choose countermeasures that are reversible. In the *Gabčíkovo-Nagymaros Project* case, the existence of this condition was recognized by the Court, although it found it was not necessary to pronounce on the matter. After concluding that “the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate”, the Court said:

“It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible.”⁷⁹⁷

However, the duty to choose measures that are reversible is not absolute. It may not be possible in all cases to reverse all of the effects of countermeasures after the occasion for taking them has ceased. For example, a requirement of notification of some activity is of no value after the activity has been undertaken. By contrast, inflicting irreparable damage on the responsible State could amount to punishment or a sanction for non-compliance, not a countermeasure as conceived in the Articles. The phrase “as far as possible” in paragraph 3 indicates that if the

⁷⁹⁵ See commentary to article 37, para. (1).

⁷⁹⁶ Similar considerations apply to assurances and guarantees of non-repetition. See article 30 (b) and commentary.

⁷⁹⁷ *Gabčíkovo-Nagymaros Project*, I.C.J. Reports 1997, p. 7, at pp. 56-57, para. 87.

injured State has a choice between a number of lawful and effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures.

Article 50

Obligations not affected by countermeasures

1. Countermeasures shall not affect:
 - (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
 - (b) Obligations for the protection of fundamental human rights;
 - (c) Obligations of a humanitarian character prohibiting reprisals;
 - (d) Other obligations under peremptory norms of general international law.
2. A State taking countermeasures is not relieved from fulfilling its obligations:
 - (a) Under any dispute settlement procedure applicable between it and the responsible State;
 - (b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Commentary

- (1) Article 50 specifies certain obligations the performance of which may not be impaired by countermeasures. An injured State is required to continue to respect these obligations in its relations with the responsible State, and may not rely on a breach by the responsible State of its obligations under Part Two to preclude the wrongfulness of any non-compliance with these obligations. So far as the law of countermeasures is concerned, they are sacrosanct.
- (2) The obligations dealt with in article 50 fall into two basic categories. Paragraph 1 deals with certain obligations which by reason of their character must not be the subject of countermeasures at all. Paragraph 2 deals with certain obligations relating in particular to the maintenance of channels of communication between the two States concerned, including machinery for the resolution of their disputes.

- (3) Paragraph 1 of article 50 identifies four categories of fundamental substantive obligations which may not be affected by countermeasures: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations, (b) obligations for the protection of fundamental human rights, (c) obligations of a humanitarian character prohibiting reprisals and (d) other obligations under peremptory norms of general international law.
- (4) Subparagraph (1) (a) deals with the prohibition of the threat or use of force as embodied in the United Nations Charter, including the express prohibition of the use of force in Article 2 (4). It excludes forcible measures from the ambit of permissible countermeasures under chapter II.
- (5) The prohibition of forcible countermeasures is spelled out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by which the General Assembly of the United Nations proclaimed that “States have a duty to refrain from acts of reprisal involving the use of force.”⁷⁹⁸ The prohibition is also consistent with prevailing doctrine as well as a number of authoritative pronouncements of international judicial⁷⁹⁹ and other bodies.⁸⁰⁰
- (6) Subparagraph (1) (b) provides that countermeasures may not affect obligations for the protection of fundamental human rights. In the “*Naulilaa*” arbitration, the Tribunal stated that a lawful countermeasure must be “limited by the requirements of humanity and the rules of good faith applicable in relations between States”.⁸⁰¹ The International Law Association in

⁷⁹⁸ General Assembly resolution 2625 (XXV) of 24 October 1970, first principle, para. 6. The Helsinki Final Act of 1 August 1975 also contains an explicit condemnation of forcible measures. Part of Principle II of the Declaration of Principles embodied in the first “Basket” of that Final Act reads: “Likewise [the participating States] will also refrain in their mutual relations from any act of reprisal by force.”

⁷⁹⁹ See esp. *Corfu Channel, Merits*, I.C.J. Reports 1949, p. 4, at p. 35; *Military and Paramilitary Activities in and against Nicaragua*, I.C.J. Reports 1986, p. 16, at p. 127, para. 249.

⁸⁰⁰ See, e.g., Security Council resolution 111 (1956), resolution 171 (1962), resolution 188 (1964), resolution 316 (1972), resolution 332 (1973), resolution 573 (1985) and resolution 1322 (2000). Also see General Assembly resolution 41/38 (20 November 1986).

⁸⁰¹ “*Naulilaa*” (*Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa*), UNRIIAA, vol. II, p. 1013 (1928), at p. 1026.

its 1934 resolution stated that in taking countermeasures a State must “abstain from any harsh measure which would be contrary to the laws of humanity or the demands of the public conscience”.⁸⁰² This has been taken further as a result of the development since 1945 of international human rights. In particular the relevant human rights treaties identify certain human rights which may not be derogated from even in time of war or other public emergency.⁸⁰³

(7) In its General Comment 8 (1997) the Committee on Economic, Social and Cultural Rights discussed the effect of economic sanctions on civilian populations and especially on children. It dealt both with the effect of measures taken by international organizations, a topic which falls outside the scope of the present Articles,⁸⁰⁴ as well as with measures imposed by individual States or groups of States. It stressed that “whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights”,⁸⁰⁵ and went on to state that:

“... it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country.”⁸⁰⁶

⁸⁰² *Annuaire de l'Institut de droit international*, vol. 38 (1934), p. 710.

⁸⁰³ See International Covenant on Civil and Political Rights, art. 4, United Nations, *Treaty Series*, vol. 999, p. 171; European Convention on Human Rights and Fundamental Freedoms, art. 15, United Nations, *Treaty Series*, vol. 213, p. 221; American Convention on Human Rights, art. 27, United Nations, *Treaty Series*, vol. 1144, p. 143.

⁸⁰⁴ See article 59 and commentary.

⁸⁰⁵ E/C.12/1997/8, 5 December 1997, para. 1.

⁸⁰⁶ *Ibid.*, para. 4.

Analogies can be drawn from other elements of general international law. For example, Additional Protocol I of 1977, article 54 (1) stipulates unconditionally that “[s]tarvation of civilians as a method of warfare is prohibited.”⁸⁰⁷ Likewise, the final sentence of article 1 (2) of the two United Nations Covenants on Human Rights states that “In no case may a people be deprived of its own means of subsistence”.⁸⁰⁸

(8) Subparagraph (1) (c) deals with the obligations of humanitarian law with regard to reprisals and is modelled on article 60 (5) of the Vienna Convention on the Law of Treaties.⁸⁰⁹ The subparagraph reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the 1929 Hague and 1949 Geneva Conventions and Additional Protocol I of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.⁸¹⁰

(9) Subparagraph (1) (d) prohibits countermeasures affecting obligations under peremptory norms of general international law. Evidently a peremptory norm, not subject to derogation as between two States even by treaty, cannot be derogated from by unilateral action in the form of countermeasures. Subparagraph (d) reiterates for the purposes of the present chapter the recognition in article 26 that the circumstances precluding wrongfulness elaborated in chapter V

⁸⁰⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), United Nations, *Treaty Series*, vol. 1125, p. 3. See also arts. 54 (2) (“objects indispensable to the survival of the civilian population”), 75. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), United Nations, *Treaty Series*, vol. 1125, p. 609, art. 4.

⁸⁰⁸ Art. 1 (2) of the International Covenant on Economic, Social and Cultural Rights, United Nations, *Treaty Series*, vol. 993, p. 3, and art. 1 (2) of the International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, p. 171.

⁸⁰⁹ Art. 60 (5) of the Vienna Convention on the Law of Treaties precludes a State from suspending or terminating for material breach any treaty provision “relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties”. This paragraph was added at the Vienna Conference on a vote of 88 votes in favour, none against and 7 abstentions.

⁸¹⁰ See K. J. Partsch, “Reprisals”, in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam, North Holland, 1986) vol. 4, p. 200, at pp. 203-204; S. Oeter, “Methods and Means of Combat”, in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford, Oxford University Press, 1995) p. 105, at pp. 204-207, paras. 476-479, with references to relevant provisions.

of Part One do not affect the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. The reference to “other” obligations under peremptory norms makes it clear that subparagraph (d) does not qualify the preceding subparagraphs, some of which also encompass norms of a peremptory character. In particular, subparagraphs (b) and (c) stand on their own. Subparagraph (d) allows for the recognition of further peremptory norms creating obligations which may not be the subject of countermeasures by an injured State.⁸¹¹

(10) States may agree between themselves on other rules of international law which may not be the subject of countermeasures, whether or not they are regarded as peremptory norms under general international law. This possibility is covered by the *lex specialis* provision in article 55 rather than by the exclusion of countermeasures under article 50 (1) (d). In particular a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject matter. This is the case, for example, with the European Union treaties, which have their own system of enforcement.⁸¹² Under the dispute settlement system of the WTO, the prior authorization of the Dispute Settlement Body is required before a Member can suspend concessions or other obligations under the WTO agreements in response to a failure of another Member to comply with recommendations and rulings of a WTO panel or the Appellate Body.⁸¹³ Pursuant to Article 23 of the WTO Dispute Settlement Understanding (DSU), Members seeking “the redress of a violation of obligations or other nullification or impairment of benefits” under the WTO agreements, “shall have recourse to, and abide by” the DSU rules and procedures. This has been construed both as an “exclusive dispute resolution clause” and as a clause “preventing WTO members from unilaterally resolving their disputes in

⁸¹¹ See commentary to article 40, paras. (4) to (6).

⁸¹² On the exclusion of unilateral countermeasures in E.U. law, see, for example, Cases 90 and 91/63, *Commission v. Luxembourg & Belgium* [1964] E.C.R. 625 at p. 631; Case 52/75, *Commission v. Italy* [1976] E.C.R. 277 at p. 284; Case 232/78, *Commission v. France* [1979] E.C.R. 2729; Case C-5/94, *R. v. M.A.F.F., ex parte Hedley Lomas (Ireland) Limited*, [1996] E.C.R. I-2553.

⁸¹³ See WTO Dispute Settlement Understanding, arts. 3.7, 22.

respect of WTO rights and obligations”.⁸¹⁴ To the extent that derogation clauses or other treaty provisions (e.g. those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are “intransgressible”,⁸¹⁵ they may entail the exclusion of countermeasures.

(11) In addition to the substantive limitations on the taking of countermeasures in paragraph 1 of article 50, paragraph 2 provides that countermeasures may not be taken with respect to two categories of obligations, viz. certain obligations under dispute settlement procedures applicable between it and the responsible State, and obligations with respect to diplomatic and consular inviolability. The justification in each case concerns not so much the substantive character of the obligation but its function in relation to the resolution of the dispute between the parties which has given rise to the threat or use of countermeasures.

(12) The first of these, contained in subparagraph (2) (a), applies to “any dispute settlement procedure applicable” between the injured State and the responsible State. This phrase refers only to dispute settlement procedures that are related to the dispute in question and not to other unrelated issues between the States concerned. For this purpose the dispute should be considered as encompassing both the initial dispute over the internationally wrongful act and the question of the legitimacy of the countermeasure(s) taken in response.

(13) It is a well-established principle that dispute settlement provisions must be upheld notwithstanding that they are contained in a treaty which is at the heart of the dispute and the continued validity or effect of which is challenged. As the International Court said in *Appeal Relating to the Jurisdiction of the ICAO Council* ...

“Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested.”⁸¹⁶

⁸¹⁴ See *United States - Sections 301-310 of the Trade Act of 1974*, Report of the Panel, 22 December 1999, WTO doc. WT/DS152/R, paras. 7.35-7.46.

⁸¹⁵ To use the synonym adopted by the International Court in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, p. 226, at p. 257, para. 79.

⁸¹⁶ *I.C.J. Reports 1972*, p. 46, at p. 53. See also S.M. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge, Grotius, 1987), pp. 13-59.

Similar reasoning underlies the principle that dispute settlement provisions between the injured and the responsible State and applicable to their dispute may not be suspended by way of countermeasures. Otherwise unilateral action would replace an agreed provision capable of resolving the dispute giving rise to the countermeasures. The point was affirmed by the International Court in the *Diplomatic and Consular Staff* case:

“In any event, any alleged violation of the Treaty [of Amity] by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes.”⁸¹⁷

(14) The second exception in subparagraph 2 (b) limits the extent to which an injured State may resort by way of countermeasures to conduct inconsistent with its obligations in the field of diplomatic or consular relations. An injured State could envisage action at a number of levels. To declare a diplomat *persona non grata*, to terminate or suspend diplomatic relations, to recall ambassadors in situations provided for in the Convention on Diplomatic Relations such acts do not amount to countermeasures in the sense of this chapter. At a second level, measures may be taken affecting diplomatic or consular privileges, not prejudicing the inviolability of diplomatic or consular personnel or of premises, archives and documents. Such measures may be lawful as countermeasures if the requirements of this chapter are met. On the other hand, the scope of prohibited countermeasures under article 50 (2) (b) is limited to those obligations which are designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents, premises, archives and documents in all circumstances, including armed conflict.⁸¹⁸ The same applies, *mutatis mutandis*, to consular officials.

(15) In the *Diplomatic and Consular Staff* case, the International Court stressed that “diplomatic law itself provides the necessary means of defence against, and sanction for, illicit

⁸¹⁷ *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at p. 28, para. 53.

⁸¹⁸ See, e.g. Vienna Convention on Diplomatic Relations, United Nations, *Treaty Series*, vol. 500, p. 95, arts. 22, 24, 29, 44, 45.

activities by members of diplomatic or consular missions”,⁸¹⁹ and it concluded that violations of diplomatic or consular immunities could not be justified even as countermeasures in response to an internationally wrongful act by the sending State. As the Court said:

“The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.”⁸²⁰

If diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations. The exclusion of any countermeasures infringing diplomatic and consular inviolability is thus justified on functional grounds. It does not affect the various avenues for redress available to the receiving State under the terms of the Vienna Conventions of 1961 and 1963.⁸²¹ On the other hand no reference need be made in article 50 (2) (b) to multilateral diplomacy. The representatives of States to international organizations are covered by the reference to diplomatic agents. As for officials of international organizations themselves, no retaliatory step taken by a host State to their detriment could qualify as a countermeasure since it would involve non-compliance not with an obligation owed to the responsible State but with an obligation owed to a third party, i.e. the international organization concerned.

⁸¹⁹ *I.C.J. Reports 1980*, p. 3, at p. 38, para. 83.

⁸²⁰ *Ibid.*, at p. 40, para. 86. Cf. Vienna Convention on Diplomatic Relations, art. 45 (a); Vienna Convention on Consular Relations, United Nations, *Treaty Series*, vol. 596, p. 261, art. 27 (1) (a) (premises, property and archives to be protected “even in case of armed conflict”).

⁸²¹ See Vienna Convention on Diplomatic Relations, arts. 9, 11, 26, 36 (2), 43 (b), 47 (2) (a); Vienna Convention on Consular Relations, arts. 10 (2), 12, 23, 25 (b), (c), 35 (3).

Article 51

Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Commentary

(1) Article 51 establishes an essential limit on the taking of countermeasures by an injured State in any given case, based on considerations of proportionality. It is relevant in determining what countermeasures may be applied and their degree of intensity. Proportionality provides a measure of assurance inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State taking such measures.

(2) Proportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence. According to the award in the “*Naulilaa*” case ...

“even if one were to admit that the law of nations does not require that the reprisal should be approximately in keeping with the offence, one should certainly consider as excessive and therefore unlawful reprisals out of all proportion to the act motivating them.”⁸²²

(3) In the *Air Services* arbitration,⁸²³ the issue of proportionality was examined in some detail. In that case there was no exact equivalence between France’s refusal to allow a change of gauge in London on flights from the west coast of the United States and the United States’ countermeasure which suspended Air France flights to Los Angeles altogether. The Tribunal

⁸²² “*Naulilaa*” (*Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa*), *UNRIIAA*, vol. II, p. 1013 (1928), at p. 1028.

⁸²³ *Air Services Agreement of 27 March 1946 (United States v. France)*, *ibid.*, vol. XVIII, p. 417 (1978).

nonetheless held the United States measures to be in conformity with the principle of proportionality because they “do not appear to be clearly disproportionate when compared to those taken by France”.⁸²⁴ In particular the majority said:

“It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach: this is a well-known rule ... It has been observed, generally, that judging the ‘proportionality’ of counter-measures is not an easy task and can at best be accomplished by approximation. In the Tribunal’s view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France. Neither Party has provided the Tribunal with evidence that would be sufficient to affirm or reject the existence of proportionality in these terms, and the Tribunal must be satisfied with a very approximative appreciation.”⁸²⁵

In that case the countermeasures taken were in the same field as the initial measures and concerned the same routes, even if they were rather more severe in terms of their economic effect on the French carriers than the initial French action.

⁸²⁴ Ibid., at p. 444, para. 83.

⁸²⁵ Ibid. M. Reuter, dissenting, accepted the Tribunal’s legal analysis of proportionality but suggested that there were “serious doubts on the proportionality of the counter-measures taken by the United States, which the Tribunal has been unable to assess definitively”. Ibid., at p. 448.

(4) The question of proportionality was again central to the appreciation of the legality of possible countermeasures taken by Czechoslovakia in the *Gabčíkovo-Nagymaros Project* case.⁸²⁶ The International Court, having accepted that Hungary's actions in refusing to complete the Project amounted to an unjustified breach of the 1977 Agreement, went on to say:

“In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question. In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:

‘[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others’...

Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well ...

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube - with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz - failed to respect the proportionality which is required by international law... The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate.”⁸²⁷

Thus the Court took into account the quality or character of the rights in question as a matter of principle and (like the Tribunal in the *Air Services* case) did not assess the question of proportionality only in quantitative terms.

⁸²⁶ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7.

⁸²⁷ Ibid., at p. 56, paras. 85, 87, citing *Territorial Jurisdiction of the International Commission of the River Oder*, 1929, P.C.I.J., Series A, No. 23, p. 27.

(5) In other areas of the law where proportionality is relevant (e.g. self-defence), it is normal to express the requirement in positive terms, even though, in those areas as well, what is proportionate is not a matter which can be determined precisely.⁸²⁸ The positive formulation of the proportionality requirement is adopted in article 51. A negative formulation might allow too much latitude, in a context where there is concern as to the possible abuse of countermeasures.

(6) Considering the need to ensure that the adoption of countermeasures does not lead to inequitable results, proportionality must be assessed taking into account not only the purely “quantitative” element of the injury suffered, but also “qualitative” factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Article 51 relates proportionality primarily to the injury suffered but “taking into account” two further criteria: the gravity of the internationally wrongful act, and the rights in question. The reference to “the rights in question” has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration.

(7) Proportionality is concerned with the relationship between the internationally wrongful act and the countermeasure. In some respects proportionality is linked to the requirement of purpose specified in article 49: a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in article 49. Proportionality is, however, a limitation even on measures which may be justified under article 49. In every case a countermeasure must be commensurate with the injury suffered, including the importance of the issue of principle involved and this has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance.

⁸²⁸ E. Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (Giuffrè, Milan, 2000).

Article 52

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:
 - (a) Call on the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;
 - (b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.
2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.
3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:
 - (a) The internationally wrongful act has ceased, and
 - (b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.
4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Commentary

- (1) Article 52 lays down certain procedural conditions relating to the resort to countermeasures by the injured State. Before taking countermeasures an injured State is required to call on the responsible State in accordance with article 43 to comply with its obligations under Part Two. The injured State is also required to notify the responsible State that it intends to take countermeasures and to offer to negotiate with that State. Notwithstanding this second requirement, the injured State may take certain urgent countermeasures to preserve its rights. If the responsible State has ceased the internationally wrongful act and the dispute is before a competent court or tribunal, countermeasures may not be taken; if already taken, they must be suspended. However this requirement does not apply if the responsible State fails to implement dispute settlement procedures in good faith. In such a case countermeasures do not have to be suspended and may be resumed.

(2) Overall, article 52 seeks to establish reasonable procedural conditions for the taking of countermeasures in a context where compulsory third party settlement of disputes may not be available, immediately or at all.⁸²⁹ At the same time it needs to take into account the possibility that there may be an international court or tribunal with authority to make decisions binding on the parties in relation to the dispute. Countermeasures are a form of self-help, which responds to the position of the injured State in an international system in which the impartial settlement of disputes through due process of law is not yet guaranteed. Where a third party procedure exists and has been invoked by either party to the dispute, the requirements of that procedure, e.g. as to interim measures of protection, should substitute as far as possible for countermeasures. On the other hand, even where an international court or tribunal has jurisdiction over a dispute and authority to indicate interim measures of protection, it may be that the responsible State is not cooperating in that process. In such cases the remedy of countermeasures necessarily revives.

(3) The system of article 52 builds upon the observations of the Tribunal in the *Air Services* arbitration.⁸³⁰ The first requirement, set out in subparagraph (1) (a), is that the injured State must call on the responsible State to fulfil its obligations of cessation and reparation before any resort to countermeasures. This requirement (sometimes referred to as “*sommatio*”) was stressed both by the Tribunal in the *Air Services* arbitration⁸³¹ and by the International Court in the *Gabčíkovo-Nagymaros Project* case.⁸³² It also appears to reflect a general practice.⁸³³

(4) The principle underlying the notification requirement is that, considering the exceptional nature and potentially serious consequences of countermeasures, they should not be taken before the other State is given notice of a claim and some opportunity to present a response. In practice, however, there are usually quite extensive and detailed negotiations over a dispute before the

⁸²⁹ See above, introduction to this chapter, para. (7).

⁸³⁰ *Air Services Agreement of 27 March 1946 (United States v. France)*, UNRIAA., vol. XVIII, p. 417 (1978), at pp. 445-446, paras. 91, 94-96.

⁸³¹ *Ibid.*, at p. 444, paras. 85-7.

⁸³² *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, at p. 56, para. 84.

⁸³³ A. Gianelli, *Adempimenti preventivi all'adozione di contromisure internazionali* (Giuffrè, Milan, 2000).

point is reached where some countermeasures are contemplated. In such cases the injured State will already have notified the responsible State of its claim in accordance with article 43, and it will not have to do it again in order to comply with subparagraph 1 (a).

(5) Subparagraph 1 (b) requires that the injured State which decides to take countermeasures should notify the responsible State of that decision to take countermeasures and offer to negotiate with that State. Countermeasures can have serious consequences for the target State, which should have the opportunity to reconsider its position faced with the proposed countermeasures. The temporal relationship between the operation of subparagraphs 1 (a) and 1 (b) is not strict. Notifications could be made close to each other or even at the same time.

(6) Under paragraph 2, however, the injured State may take “such urgent countermeasures as are necessary to preserve its rights” even before any notification of the intention to do so. Under modern conditions of communications, a State which is responsible for an internationally wrongful act and which refuses to cease that act or provide any redress therefor may also seek to immunize itself from countermeasures, for example by withdrawing assets from banks in the injured State. Such steps can be taken within a very short time, so that the notification required by subparagraph (1) (b) might frustrate its own purpose. Hence paragraph 2 allows for urgent countermeasures which are necessary to preserve the rights of the injured State: this phrase includes both its rights in the subject-matter of the dispute and its right to take countermeasures. Temporary stay orders, the temporary freezing of assets and similar measures could fall within paragraph 2, depending on the circumstances.

(7) Paragraph 3 deals with the case in which the wrongful act has ceased and the dispute is submitted to a court or tribunal which has the authority to decide it with binding effect for the parties. In such a case, and for so long as the dispute settlement procedure is being implemented in good faith, unilateral action by way of countermeasures is not justified. Once the conditions in paragraph 3 are met the injured State may not take countermeasures; if already taken, they must be suspended “without undue delay”. The phrase “without undue delay” allows a limited tolerance for the arrangements required to suspend the measures in question.

(8) A dispute is not “pending before a court or tribunal” for the purposes of subparagraph 3 (b) unless the court or tribunal exists and is in a position to deal with the case. For these purposes a dispute is not pending before an ad hoc tribunal established pursuant to a treaty until the tribunal is actually constituted, a process which will take some time even if both

parties are cooperating in the appointment of the members of the tribunal.⁸³⁴ Paragraph 3 is based on the assumption that the court or tribunal to which it refers has jurisdiction over the dispute and also the power to order provisional measures. Such power is a normal feature of the rules of international courts and tribunals.⁸³⁵ The rationale behind paragraph 3 is that once the parties submit their dispute to such a court or tribunal for resolution, the injured State may request it to order provisional measures to protect its rights. Such a request, provided the court or tribunal is available to hear it, will perform a function essentially equivalent to that of countermeasures. Provided the order is complied with it will make countermeasures unnecessary pending the decision of the tribunal. The reference to a “court or tribunal” is intended to refer to any third party dispute settlement procedure, whatever its designation. It does not, however, refer to political organs such as the Security Council. Nor does it refer to a tribunal with jurisdiction between a private party and the responsible State, even if the dispute between them has given rise to the controversy between the injured State and the responsible State. In such cases, however, the fact that the underlying dispute has been submitted to arbitration will be relevant for the purposes of articles 49 and 51, and only in exceptional cases will countermeasures be justified.⁸³⁶

⁸³⁴ Hence art. 290 (5) of the United Nations Convention on the Law of the Sea (Montego Bay, United Nations, *Treaty Series*, vol. 1833, p. 396) provides for the International Tribunal on the Law of the Sea to deal with provisional measures requests “[p]ending the constitution of an arbitral tribunal to which the dispute is being submitted”.

⁸³⁵ The binding effect of provisional measures orders under Part XI of the 1982 Convention is assured by art. 290 (6). For the binding effect of provisional measures orders under art. 41 of the Statute of the International Court of Justice see the decision in *LaGrand (Germany v. United States of America)*, *Merits*, judgment of 27 June 2001, paras. 99-104.

⁸³⁶ Under the Washington Convention of 1965, the State of nationality may not bring an international claim of behalf of a claimant individual or company “in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such a dispute”: Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, United Nations, *Treaty Series*, vol. 575, p. 159., art. 27 (1); C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) pp. 397-414. This excludes all forms of invocation of responsibility by the State of nationality, including the taking of countermeasures. See commentary to article 42, para. (2).

(9) Paragraph 4 of article 52 provides a further condition for the suspension of countermeasures under paragraph 3. It comprehends various possibilities, ranging from an initial refusal to cooperate in the procedure, for example by non-appearance, through non-compliance with a provisional measures order, whether or not it is formally binding, through to refusal to accept the final decision of the court or tribunal. This paragraph also applies to situations where a State party fails to cooperate in the establishment of the relevant tribunal or fails to appear before the tribunal once it is established. Under the circumstances of paragraph 4, the limitations to the taking of countermeasures under paragraph 3 do not apply.

Article 53

Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

Commentary

- (1) Article 53 deals with the situation where the responsible State has complied with its obligations of cessation and reparation under Part Two in response to countermeasures taken by the injured State. Once the responsible State has complied with its obligations under Part Two, no ground is left for maintaining countermeasures, and they must be terminated forthwith.
- (2) The notion that countermeasures must be terminated as soon as the conditions which justified them have ceased is implicit in the other articles in this chapter. In view of its importance, however, article 53 makes this clear. It underlines the specific character of countermeasures under article 49.

Article 54

Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Commentary

(1) Chapter II deals with the right of an injured State to take countermeasures against a responsible State in order to induce that State to comply with its obligations of cessation and reparation. However, “injured” States, as defined in article 42 are not the only States entitled to invoke the responsibility of a State for an internationally wrongful act under chapter I of this Part. Article 48 allows such invocation by any State, in the case of the breach of an obligation to the international community as a whole, or by any member of a group of States, in the case of other obligations established for the protection of the collective interest of the group. By virtue of article 48 (2), such States may also demand cessation and performance in the interests of the beneficiaries of the obligation breached. Thus with respect to the obligations referred to in article 48, such States are recognized as having a legal interest in compliance. The question is to what extent these States may legitimately assert a right to react against unremedied breaches.⁸³⁷

(2) It is vital for this purpose to distinguish between individual measures, whether taken by one State or by a group of States each acting in its individual capacity and through its own organs on the one hand, and institutional reactions in the framework of international organisations on the other. The latter situation, for example where it occurs under the authority of Chapter VII of the United Nations Charter, is not covered by the Articles.⁸³⁸ More generally the Articles do not cover the case where action is taken by an international organization, even though the member States may direct or control its conduct.⁸³⁹

⁸³⁷ See e.g., M. Akehurst, “Reprisals by Third States”, *B.Y.I.L.*, vol. 44 (1970), p. 1; J.I. Charney, “Third State Remedies in International Law”, *Michigan Journal of International Law*, vol. 10 (1988), p. 57; D.N. Hutchinson, “Solidarity and Breaches of Multilateral Treaties”, *B.Y.I.L.*, vol. 59 (1988), p. 151; L.-A. Sicilianos, *Les réactions décentralisées à l’illicite* (Paris, LDGJ, 1990), pp. 110-175; B. Simma, “From Bilateralism to Community Interest in International Law”, *Recueil des cours*, vol. 250 (1994-VI), p. 217; J.A. Frowein, “Reactions by Not Directly Affected States to Breaches of Public International Law”, *Recueil des cours*, vol. 248 (1994-IV), p. 345.

⁸³⁸ See article 59 and commentary.

⁸³⁹ See article 57 and commentary.

(3) Practice on this subject is limited and rather embryonic. In a number of instances, States have reacted against what were alleged to be breaches of the obligations referred to in article 48 without claiming to be individually injured. Reactions have taken such forms as economic sanctions or other measures (e.g. breaking off air links or other contacts). Examples include the following:

- *USA - Uganda (1978)*. In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda.⁸⁴⁰ The legislation recited that “[t]he Government of Uganda... has committed genocide against Ugandans” and that the “United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide”.⁸⁴¹
- *Certain western countries - Poland and Soviet Union (1981)*. On 13 December 1981, the Polish government imposed martial law and subsequently suppressed demonstrations and interned many dissidents.⁸⁴² The United States and other western countries took action against both Poland and the Soviet Union. The measures included the suspension, with immediate effect, of treaties providing for landing rights of Aeroflot in the United States and LOT in the United States, Great Britain, France, the Netherlands, Switzerland and Austria.⁸⁴³ The suspension procedures provided for in the respective treaties were disregarded.⁸⁴⁴
- *Collective measures against Argentina (1982)*. In April 1982, when Argentina took control over part of the Falkland Islands (Malvinas), the Security Council called for an immediate withdrawal.⁸⁴⁵ Following a request by the United Kingdom,

⁸⁴⁰ Uganda Embargo Act, 22 USC s. 2151 (1978).

⁸⁴¹ *Ibid.*, sections. 5c, 5d.

⁸⁴² *R.G.D.I.P.*, vol. 86 (1982), pp. 603-604.

⁸⁴³ *Ibid.*, p. 607.

⁸⁴⁴ See e.g. art. XV of the US-Polish agreement of 1972, 23 U.S.T. 4269; art. XVII of the US-Soviet agreement of 1967, *I.L.M.*, vol. 6, (1967), p. 82; *I.L.M.*, vol. 7 (1968), p. 571.

⁸⁴⁵ S.C. Res. 502 (1982), 3 April 1982.

E.C. members, Australia, New Zealand and Canada adopted trade sanctions. These included a temporary prohibition on all imports of Argentine products, which ran contrary to article XI:1 and possibly article III of the GATT. It was disputed whether the measures could be justified under the national security exception provided for in article XXI (b) (iii) of the GATT.⁸⁴⁶ The embargo adopted by the European countries also constituted a suspension of Argentina's rights under two sectoral agreements on trade in textiles and trade in mutton and lamb,⁸⁴⁷ for which security exceptions of GATT did not apply.

- *USA - South Africa (1986)*. When in 1985, the South African government declared a state of emergency in large parts of the country, the UN Security Council recommended the adoption of sectoral economic boycotts and the freezing of cultural and sports relations.⁸⁴⁸ Subsequently, some countries introduced measures which went beyond those recommended by the Security Council. The United States Congress adopted the Comprehensive Anti-Apartheid Act which suspended landing rights of South African Airlines on US territory.⁸⁴⁹ This immediate suspension was contrary to the terms of the 1947 US-South African Aviation Agreement⁸⁵⁰ and was justified as a measure which should encourage the South African government "to adopt measures leading towards the establishment of a non-racial democracy".⁸⁵¹

⁸⁴⁶ Western States' reliance on this provision was disputed by other GATT members, cf. Communiqué of western countries, GATT doc. L. 5319/Rev.1 and the statements by Spain and Brasil, GATT doc. C/M/157, pp. 5-6. For an analysis see H. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (Berlin, Springer, 1996), pp. 328-34.

⁸⁴⁷ The treaties are reproduced in *O.J.E.C.* 1979 L 298, p. 2; *O.J.E.C.*, 1980 L 275, p. 14.

⁸⁴⁸ S.C. Res. 569 (1985), 26 July 1985. For further references see L-A. Sicilianos, *Les réactions décentralisées à l'illicite* (Paris, L.D.G.J., 1990), p. 165.

⁸⁴⁹ For the text of this provision see *I.L.M.*, vol. 26 (1987), p. 79, (s. 306).

⁸⁵⁰ United Nations, *Treaty Series*, vol. 66, p. 233, art. VI.

⁸⁵¹ For the implementation order, see *I.L.M.*, vol. 26 (1987), p. 105.

- *Collective measures against Iraq (1990)*. On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The United Nations Security Council immediately condemned the invasion. E.C. member States and the United States adopted trade embargos and decided to freeze Iraqi assets.⁸⁵² This action was taken in direct response to the Iraqi invasion with the consent of the Government of Kuwait.
- *Collective measures against Yugoslavia (1998)*. In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban.⁸⁵³ For a number of countries, such as Germany, France and the United Kingdom, the latter measure implied the non-performance of bilateral aviation agreements.⁸⁵⁴ Because of doubts about the legitimacy of the action, the British government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect. Justifying the measure, it stated that “President Milosevic’s ... worsening record on human rights, means that, on moral and political grounds, he has forfeited the right of his Government to insist on the 12 months notice which would normally apply.”⁸⁵⁵ The Federal Republic of Yugoslavia protested these measures as “unlawful, unilateral and an example of the policy of discrimination”.⁸⁵⁶

⁸⁵² See e.g. President Bush’s Executive Orders of 2 August 1990, reproduced in *A.J.I.L.*, vol. 84 (1990), p. 903.

⁸⁵³ Common positions of 7 May and 29 June 1998, *O.J.E.C.* 1998, L 143 (p. 1) and L 190 (p. 3); implemented through EC Regulations 1295/98 (L 178, p. 33) & 1901/98 (L 248, p. 1).

⁸⁵⁴ See e.g. *U.K.T.S.* 1960, No. 10; *R.T.A.F.* 1967, No. 69.

⁸⁵⁵ See *B.Y.I.L.*, vol. 69 (1998), pp. 580-1; *B.Y.I.L.*, vol. 70 (1999), pp. 555-6.

⁸⁵⁶ Statement of the Government of the Federal Republic of Yugoslavia on the Suspension of Flights of Yugoslav Airlines, 10 October 1999: S/1999/216.

(4) In some other cases, certain States similarly suspended treaty rights in order to exercise pressure on States violating collective obligations. However, they did not rely on a right to take countermeasures but asserted a right to suspend the treaty because of a fundamental change of circumstances. Two examples may be given:

- *Netherlands - Surinam (1982)*. In 1980, a military government seized power in Surinam. In response to a crackdown by the new government on opposition movements in December 1982, the Dutch government suspended a bilateral treaty on development assistance under which Surinam was entitled to financial subsidies.⁸⁵⁷ While the treaty itself did not contain any suspension or termination clauses, the Dutch government stated that the human rights violations in Surinam constituted a fundamental change of circumstances which gave rise to a right of suspension.⁸⁵⁸
- *E.C. Member States - Yugoslavia (1991)*. In the autumn of 1991, in response to resumption of fighting within Yugoslavia, EC members suspended and later denounced the 1983 Co-operation Agreement with Yugoslavia.⁸⁵⁹ This led to a general repeal of trade preferences on imports and thus went beyond the weapons embargo ordered by the Security Council in Resolution 713 of 25 September 1991. The reaction was incompatible with the terms of the Co-operation Agreement, which did not provide for the immediate suspension but only for denunciation upon six months' notice. Justifying the suspension, EC member States explicitly mentioned the threat to peace and security in the region. But as in the case of Surinam, they relied on fundamental change of circumstances, rather than asserting a right to take countermeasures.⁸⁶⁰

⁸⁵⁷ *Tractatenblad* 1975, No. 140. See H.-H. Lindemann, "Die Auswirkungen der Menschenrechtsverletzungen auf die Vertragsbeziehungen zwischen den Niederlanden und Surinam", *Z.a.ö.R.V.*, vol. 44 (1984), p. 64 at pp. 68-69.

⁸⁵⁸ P. Siekmann, "Netherlands State Practice for the Parliamentary Year 1982-1983", *Netherlands Yearbook of International Law*, vol. 15 (1984), p. 321.

⁸⁵⁹ *O.J.E.C.* 1983 L 41, p. 1. See *O.J.E.C.* 1991 L 315, p. 1, for the suspension, and L 325, p. 23, for the denunciation.

⁸⁶⁰ See also the decision of the European Court of Justice: Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, [1998] E.C.R. I-3655, at pp. 3706-3708, paras. 53-59.

(5) In some cases, there has been an apparent willingness on the part of some States to respond to violations of obligations involving some general interest, where those States could not be considered “injured States” in the sense of article 42. It should be noted that in those cases where there was, identifiably, a State primarily injured by the breach in question, other States have acted at the request and on behalf of that State.⁸⁶¹

(6) As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently it is not appropriate to include in the present Articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law.

(7) Article 54 accordingly provides that the chapter on countermeasures does not prejudice the right of any State, entitled under article 48 (1) to invoke the responsibility of another State, to take lawful measures against the responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached. The Article speaks of “lawful measures” rather than “countermeasures” so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole.

PART FOUR

GENERAL PROVISIONS

This Part contains a number of general provisions applicable to the Articles as a whole, specifying either their scope or certain matters not dealt with. First, article 55 makes it clear by reference to the *lex specialis* principle that the Articles have a residual character. Where some

⁸⁶¹ Cf. *Military and Paramilitary Activities* where the International Court noted that action by way of collective self-defence could not be taken by a third State except at the request of the State subjected to the armed attack: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, I.C.J. Reports 1986, p. 14, at p. 105, para. 199.

matter otherwise dealt with in the Articles is governed by a special rule of international law, the latter will prevail to the extent of any inconsistency. Correlatively, article 56 makes it clear that the Articles are not exhaustive, and that they do not affect other applicable rules of international law on matters not dealt with. There follow three saving clauses. Article 57 excludes from the scope of the Articles questions concerning the responsibility of international organizations and of States for the acts of international organizations. The Articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State, and this is made clear by article 58. Finally, article 59 reserves the effects of the United Nations Charter itself.

Article 55

Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Commentary

- (1) When defining the primary obligations that apply between them, States often make special provision for the legal consequences of breaches of those obligations, and even for determining whether there has been such a breach. The question then is whether those provisions are exclusive, i.e. whether the consequences which would otherwise apply under general international law, or the rules that might otherwise have applied for determining a breach, are thereby excluded. A treaty may expressly provide for its relationship with other rules. Often, however, it will not do so and the question will then arise whether the specific provision is to coexist with or exclude the general rule that would otherwise apply.
- (2) Article 55 provides that the Articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law. It reflects the maxim *lex specialis derogat legi generali*. Although it may provide an important indication, this is only one of a number of possible approaches towards determining which of several rules potentially applicable is to prevail or whether the rules simply coexist. Another gives priority, as between the parties, to the

rule which is later in time.⁸⁶² In certain cases the consequences that follow from a breach of some overriding rule may themselves have a peremptory character. For example States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law. Thus the assumption of article 55 is that the special rules in question have at least the same legal rank as those expressed in the Articles. On that basis, article 55 makes it clear that the present articles operate in a residual way.

(3) It will depend on the special rule to establish the extent to which the more general rules on State responsibility set out in the present articles are displaced by that rule. In some cases it will be clear from the language of a treaty or other text that only the consequences specified are to flow. Where that is so, the consequence will be “determined” by the special rule and the principle embodied in article 56 will apply. In other cases, one aspect of the general law may be modified, leaving other aspects still applicable. An example of the former is the World Trade Organization Dispute Settlement Understanding as it relates to certain remedies.⁸⁶³ An example of the latter is article 41 of the European Convention on Human Rights.⁸⁶⁴ Both concern matters dealt with in Part Two of the Articles. The same considerations apply to Part One. Thus a particular treaty might impose obligations on a State but define the “State” for that purpose in a

⁸⁶² See Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 30 (3).

⁸⁶³ Agreement establishing the World Trade Organization, Marrakesh, United Nations, *Treaty Series*, vol. 1867, p. 3, Annex 2, Understanding on Rules and Procedures governing the Settlement of Disputes, esp. art. 3 (7), which provides for compensation “only if the immediate withdrawal of the measure is impractical and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement”. For WTO purposes, “compensation” refers to the future conduct, not past conduct and involves a form of countermeasure. See art. 22. On the distinction between cessation and reparation for WTO purposes see e.g. *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, Panel Report, 21 January 2000, WT/DS126/RW, para. 6.49.

⁸⁶⁴ See commentary to article 32, paragraph (2).

way which produces different consequences than would otherwise flow from the rules of attribution in chapter II.⁸⁶⁵ Or a treaty might exclude a State from relying on *force majeure* or necessity.

(4) For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus the question is essentially one of interpretation. For example in the *Neumeister* case, the European Court of Human Rights held that the specific obligation in article 5 (5) of the European Convention for compensation for unlawful arrest or detention did not prevail over the more general provision for compensation in article 50. In the Court's view, to have applied the *lex specialis* principle to article 5 (5) would have led to "consequences incompatible with the aim and object of the treaty".⁸⁶⁶ It was sufficient, in applying article 50, to take account of the specific provision.⁸⁶⁷

(5) Article 55 is designed to cover both "strong" forms of *lex specialis*, including what are often referred to as self-contained regimes, as well as "weaker" forms such as specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution. The Permanent Court of International Justice referred to the notion of a self-contained regime in

⁸⁶⁵ Thus article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, *Treaty Series*, vol. 1465, p. 112, only applies to torture committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". This is probably narrower than the bases for attribution of conduct to the State in Part One, chapter II. Cf. "federal" clauses, allowing certain component units of the State to be excluded from the scope of a treaty or limiting obligations of the federal State with respect to such units, e.g. UNESCO Convention for the Protection of the World Cultural and Natural Heritage, United Nations, *Treaty Series*, vol. 1037, p. 151, art. 34.

⁸⁶⁶ *E.C.H.R., Series A, No. 17* (1974), p. 13, para. 29; see also *ibid.*, pp. 12-14, paras. 28-31.

⁸⁶⁷ See also *Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A, No. 2*, at pp. 29-33; *Colleanu v. German State*, (1929), *Recueil des tribunaux arbitraux mixtes*, vol. IX, p. 216; WTO, *Turkey - Restrictions on Imports of Textile and Clothing Products*, Panel Report, 31 May 1999, WT/DS34/R, paras. 9.87-9.95; *Beagle Channel Arbitration (Argentina v. Chile)*, *UNRIAA*, vol. XXI, p. 53 (1977), at p. 100, para. 39. See further C.W. Jenks, "The Conflict of Law-Making Treaties", *B.Y.I.L.*, vol. 30 (1953), p. 401; M. McDougal, H. Lasswell & J. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (New Haven, New Haven Press, 1994), pp. 200-206; P. Reuter, *Introduction au Droit des Traités* (3rd edn.) (Paris, Presses Universitaires de France, 1995), para. 201.

The S.S. Wimbledon with respect to the transit provisions concerning the Kiel Canal in the Treaty of Versailles,⁸⁶⁸ as did the International Court of Justice in the *Diplomatic and Consular Staff* case with respect to remedies for abuse of diplomatic and consular privileges.⁸⁶⁹

(6) The principle stated in article 55 applies to the Articles as a whole. This point is made clear by the use of language (“the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State”) which reflects the content of each of Parts One, Two and Three.

Article 56

Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Commentary

(1) The present Articles set out by way of codification and progressive development the general secondary rules of State responsibility. In that context, article 56 has two functions. First, it preserves the application of the rules of customary international law concerning State responsibility on matters not covered by the Articles. Secondly, it preserves other rules concerning the effects of a breach of an international obligation which do not involve issues of State responsibility but stem from the law of treaties or other areas of international law. It complements the *lex specialis* principle stated in article 55. Like article 55, it is not limited to the legal consequences of wrongful acts but applies to the whole regime of State responsibility set out in the Articles.

(2) As to the first of these functions, the Articles do not purport to state all the consequences of an internationally wrongful act even under existing international law and there is no intention of precluding the further development of the law on State responsibility. For example the principle of law expressed in the maxim *ex injuria jus non oritur* may generate new legal

⁸⁶⁸ 1923, *P.C.I.J., Series A, No. 1*, at pp. 23-24.

⁸⁶⁹ *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at p. 40, para. 86. See commentary to article 50, para. (15), and see also B. Simma, “Self-Contained Regimes”, *Netherlands Yearbook of International Law*, vol. 16 (1985), p. 111.

consequences in the field of responsibility.⁸⁷⁰ In this respect article 56 mirrors the preambular paragraph of the Vienna Convention on the Law of Treaties which affirms that “the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention”. However matters of State responsibility are not only regulated by customary international law but also by some treaties; hence article 56 refers to the “applicable rules of international law”.

(3) A second function served by article 56 is to make it clear that present Articles are not concerned with any legal effects of a breach of an international obligation which do not flow from the rules of State responsibility, but stem from the law of treaties or other areas of law. Examples include the invalidity of a treaty procured by an unlawful use of force,⁸⁷¹ the exclusion of reliance on a fundamental change of circumstances where the change in question results from a breach of an international obligation of the invoking State to any other State party,⁸⁷² or the termination of the international obligation violated in the case of a material breach of a bilateral treaty.⁸⁷³

Article 57

Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

⁸⁷⁰ Another possible example, related to the determination whether there has been a breach of an international obligation, is the so-called principle of “approximate application”, formulated by Sir Hersch Lauterpacht in *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, *I.C.J. Reports 1956*, p. 23, at p. 46. In the *Gabčíkovo-Nagymaros Project* case, the International Court said that “even if such a principle existed, it could by definition only be employed within the limits of the treaty in question”: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports 1997*, p. 7, at p. 53, para. 76. See further S. Rosenne, *Breach of Treaty* (Grotius, Cambridge, 1985) pp. 96-101.

⁸⁷¹ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 52.

⁸⁷² *Ibid.*, art. 62 (2) (b).

⁸⁷³ *Ibid.*, art. 60 (1).

Commentary

- (1) Article 57 is a saving clause which reserves two related issues from the scope of the Articles. These concern, first, any question involving the responsibility of international organizations, and second, any question concerning the responsibility of any State for the conduct of an international organization.
- (2) In accordance with the articles prepared by the Commission on other topics, the expression “international organization” means an “intergovernmental organization”.⁸⁷⁴ Such an organization possesses separate legal personality under international law,⁸⁷⁵ and is responsible for its own acts, i.e., for acts which are carried out by the organization through its own organs or officials.⁸⁷⁶ By contrast, where a number of States act together through their own organs as distinct from those of an international organization, the conduct in question is that of the States concerned, in accordance with the principles set out in chapter II of Part One. In such cases, as article 47 confirms, each State remains responsible for its own conduct.
- (3) Just as a State may second officials to another State, putting them at its disposal so that they act for the purposes of and under the control of the latter, so the same could occur as between an international organization and a State. The former situation is covered by article 6. As to the latter situation, if a State seconds officials to an international organization so that they act as organs or officials of the organization, their conduct will be attributable to the organization, not the sending State, and will fall outside the scope of the Articles. As to the

⁸⁷⁴ See Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, art. 2 (1) (i).

⁸⁷⁵ A firm foundation for the international personality of the United Nations is laid in the International Court’s advisory opinion in *Reparation for Injuries Suffered in the Service of the United Nations*, *I.C.J. Reports 1949*, p. 174, at p. 179.

⁸⁷⁶ As the International Court has observed, “the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts”. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, *I.C.J. Reports 1999*, p. 62, at pp. 88-89, para. 66.

converse situation, in practice there do not seem to be convincing examples of organs of international organizations which have been “placed at the disposal of” a State in the sense of article 6,⁸⁷⁷ and there is no need to provide expressly for the possibility.

(4) Article 57 also excludes from the scope of the Articles issues of the responsibility of a State for the acts of an international organization, i.e., those cases where the international organization is the actor and the State is said to be responsible by virtue of its involvement in the conduct of the organization or by virtue of its membership of the organization. Formally such issues could fall within the scope of the present Articles since they concern questions of State responsibility akin to those dealt with in chapter IV of Part One. But they raise controversial substantive questions as to the functioning of international organizations and the relations between their members, questions which are better dealt with in the context of the law of international organizations.⁸⁷⁸

⁸⁷⁷ Cf. *Yearbook ... 1974*, vol. II, pp. 286-290. The High Commissioner for the Free City of Danzig was appointed by the League of Nations Council and was responsible to it; see *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, 1932*, P.C.I.J., Series A/B, No. 44, p. 4. Although the High Commission exercised powers in relation to Danzig, it is doubtful that he was placed at the disposal of Danzig within the meaning of article 6. The position of the High Representative, appointed pursuant to Annex 10 of the General Framework Agreement for Peace in Bosnia-Herzegovina of 14 December 1995, is also unclear. The Constitutional Court of Bosnia-Herzegovina has held that the High Representative has a dual role, both as an international agent and as a official in certain circumstances acting in and for Bosnia-Herzegovina; in the latter respect, the High Representative's acts are subject to constitutional control. See *Case U 9/100 Regarding the Law on the State Border Service*, judgment of 3 November 2000.

⁸⁷⁸ This area of international law has acquired significance following controversies, *inter alia*, over the International Tin Council: *J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry* [1990] 2 A.C. 418 (England, House of Lords); *Case 241/87 Maclaine Watson & Co Ltd. v. Council and Commission of the European Communities* [1990] E.C.R. I-1797 (E.C.J.) and the Arab Organization for Industrialization (*Westland Helicopters Ltd. v. Arab Organization for Industrialization*, (1985), *I.L.R.*, vol. 80, p. 595 (I.C.C. Award); *Arab Organization for Industrialization v. Westland Helicopters Ltd.*, (1987) *I.L.R.*, vol. 80, p. 622 (Switzerland, Federal Supreme Court); *Westland Helicopters Ltd. v. Arab Organization for Industrialization*, (1994) *I.L.R.* vol. 108, p. 564 (England, High Court). See also *Waite and Kennedy v. Germany*, *E.C.H.R. Reports 1999-I*, p. 393.

(5) On the other hand article 57 does not exclude from the scope of the Articles any question of the responsibility of a State for its own conduct, i.e., for conduct attributable to it under chapter II of Part One, not being conduct performed by an organ of an international organization. In this respect the scope of article 57 is narrow. It covers only what is sometimes referred to as the derivative or secondary liability of member States for the acts or debts of an international organization.⁸⁷⁹

Article 58

Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Commentary

(1) Article 58 makes clear that the Articles as a whole do not address any question of the individual responsibility under international law of any person acting on behalf of a State. It clarifies a matter which could be inferred in any case from the fact that the Articles only address issues relating to the responsibility of States.

(2) The principle that individuals, including State officials, may be responsible under international law was established in the aftermath of World War II. It was included in the London Charter of 1945 which established the Nürnberg Tribunal⁸⁸⁰ and was subsequently endorsed by the General Assembly.⁸⁸¹ It underpins more recent developments in the field of international criminal law, including the two ad hoc tribunals and the Rome Statute of the

⁸⁷⁹ See the work of the Institut de Droit International under Prof. R. Higgins *Annuaire de l'Institut de Droit International*, vol. 66-I (1995), p. 251; vol. 66-II (1996), p. 444; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruylant Editions de l'Université de Bruxelles, Brussels, 1998). See also WTO, *Turkey - Restrictions on Imports of Textile and Clothing Products*, Panel Report, 31 May 1999, WT/DS34/R, paras. 9.33-9.44.

⁸⁸⁰ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, London, United Nations, *Treaty Series*, vol. 82, p. 279.

⁸⁸¹ G.A. Res. 95 (I), 11 December 1946. See also the International Law Commission's Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook...* 1950, vol. II, p. 374.

International Criminal Court.⁸⁸² So far this principle has operated in the field of criminal responsibility, but it is not excluded that developments may occur in the field of individual civil responsibility.⁸⁸³ As a saving clause article 58 is not intended to exclude that possibility; hence the use of the general term “individual responsibility”.

(3) Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility.⁸⁸⁴ The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.⁸⁸⁵ Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them. The former principle is reflected, for example, in article 25 (4) of the Rome Statute, which provides that “[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.” The latter is reflected, for example, in the well-established principle that official position does not excuse a person from individual criminal responsibility under international law.⁸⁸⁶

⁸⁸² See commentary to Part Two, chapter III, para. (6).

⁸⁸³ See e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, *Treaty Series*, vol. 1465 p. 112, art. 14, dealing with compensation for victims of torture.

⁸⁸⁴ See e.g., *Streletz, Kessler & Krenz v. Germany*, (Applications Nos. 34044/96, 35532/97 and 44801/98), European Court of Human Rights, judgement of 22 March 2001, at para. 104; (“If the GDR still existed, it would be responsible from the viewpoint of international law for the acts concerned. It remains to be established that alongside that State responsibility the applicants individually bore criminal responsibility at the material time”).

⁸⁸⁵ Prosecution and punishment of responsible State officials may be relevant to reparation, especially satisfaction: see commentary to article 36, para. (5).

⁸⁸⁶ See e.g., the International Law Commission’s Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle III (*Yearbook...* 1950, vol. II, p. 374, at p. 375); Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, art. 27.

(4) Article 58 reflects this situation, making it clear that the Articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term “individual responsibility” has acquired an accepted meaning in light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.

Article 59

Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

Commentary

(1) In accordance with article 103 of the Charter, “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” The focus of article 103 is on treaty obligations inconsistent with obligations arising under the Charter. But such conflicts can have an incidence on issues dealt with in the Articles, as for example in the *Lockerbie* cases.⁸⁸⁷ More generally, the competent organs of the United Nations have often recommended or required that compensation be paid following conduct by a State characterized as a breach of its international obligations, and article 103 may have a role to play in such cases.

(2) Article 59 accordingly provides that the Articles cannot affect and are without prejudice to the Charter of the United Nations. The Articles are in all respects to be interpreted in conformity with the Charter of the United Nations.

⁸⁸⁷ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, I.C.J. Reports 1992, p. 3; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, I.C.J. Reports 1992, p. 114.

Commentaries to the draft articles on

Responsibility of States for internationally wrongful acts

adopted by the
International Law Commission
at its fifty-third session (2001)

(extract from the Report of the International Law Commission on the work of its Fifty-third session,
Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2)

November 2001

2. Text of the draft articles with commentaries thereto

77. The text of the draft articles with commentaries thereto adopted by the Commission at its fifty-third session, are reproduced below:

RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

(1) These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive international law, customary and conventional.

(2) Roberto Ago, who was responsible for establishing the basic structure and orientation of the project, saw the articles as specifying ...

“the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may

generate responsibility ... [I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation.”³³

(3) Given the existence of a primary rule establishing an obligation under international law for a State, and assuming that a question has arisen as to whether that State has complied with the obligation, a number of further issues of a general character arise. These include:

- (a) The role of international law as distinct from the internal law of the State concerned in characterizing conduct as unlawful;
- (b) Determining in what circumstances conduct is to be attributed to the State as a subject of international law;
- (c) Specifying when and for what period of time there is or has been a breach of an international obligation by a State;
- (d) Determining in what circumstances a State may be responsible for the conduct of another State which is incompatible with an international obligation of the latter;
- (e) Defining the circumstances in which the wrongfulness of conduct under international law may be precluded;
- (f) Specifying the content of State responsibility, i.e. the new legal relations that arise from the commission by a State of an internationally wrongful act, in terms of cessation of the wrongful act, and reparation for any injury done;
- (g) Determining any procedural or substantive preconditions for one State to invoke the responsibility of another State, and the circumstances in which the right to invoke responsibility may be lost;
- (h) Laying down the conditions under which a State may be entitled to respond to a breach of an international obligation by taking countermeasures designed to ensure the fulfilment of the obligations of the responsible State under these articles.

This is the province of the secondary rules of State responsibility.

³³ *Yearbook ... 1970*, vol. II, p. 306, para. 66 (c).

(4) A number of matters do not fall within the scope of State responsibility as dealt with in the present articles:

First, as already noted, it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation. Nor do the articles deal with the question whether and for how long particular primary obligations are in force for a State. It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted. The same is true, *mutatis mutandis*, for other “sources” of international obligations, such as customary international law. The articles take the existence and content of the primary rules of international law as they are at the relevant time; they provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States.

Secondly, the consequences dealt with in the articles are those which flow from the commission of an internationally wrongful act as such.³⁴ No attempt is made to deal with the consequences of a breach for the continued validity or binding effect of the primary rule (e.g. the right of an injured State to terminate or suspend a treaty for material breach, as reflected in article 60 of the Vienna Convention on the Law of Treaties). Nor do the articles cover such indirect or additional consequences as may flow from the responses of international organizations to wrongful conduct. In carrying out their functions it may be necessary for international organizations to take a position on whether a State has breached an international obligation. But even where this is so, the consequences will be those determined by or within the framework of the constituent instrument of the organization, and these fall outside the scope of the articles. This is particularly the case with action of the United Nations under the Charter, which is specifically reserved by article 59.

³⁴ For the purposes of the articles, the term “internationally wrongful act” includes an omission, and extends to conduct consisting of several actions or omissions which together amount to an internationally wrongful act. See commentary to article 1, para. (1).

Thirdly, the articles deal only with the responsibility for conduct which is internationally wrongful. There may be cases where States incur obligations to compensate for the injurious consequences of conduct which is not prohibited, and may even be expressly permitted, by international law (e.g. compensation for property duly taken for a public purpose). There may also be cases where a State is obliged to restore the *status quo ante* after some lawful activity has been completed. These requirements of compensation or restoration would involve primary obligations; it would be the failure to pay compensation, or to restore the status quo which would engage the international responsibility of the State concerned. Thus for the purposes of these articles, international responsibility results exclusively from a wrongful act contrary to international law. This is reflected in the title of the articles.

Fourthly, the articles are concerned only with the responsibility of States for internationally wrongful conduct, leaving to one side issues of the responsibility of international organizations or of other non-State entities (see articles 57, 58).

(5) On the other hand the present articles are concerned with the whole field of State responsibility. Thus they are not limited to breaches of obligations of a bilateral character, e.g. under a bilateral treaty with another State. They apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole. Being general in character, they are also for the most part residual. In principle States are free, when establishing or agreeing to be bound by a rule, to specify that its breach shall entail only particular consequences and thereby to exclude the ordinary rules of responsibility. This is made clear by article 55.

(6) The present articles are divided into four Parts. Part One is entitled “The Internationally Wrongful Act of a State”. It deals with the requirements for the international responsibility of a State to arise. Part Two, “Content of the International Responsibility of a State”, deals with the legal consequences for the responsible State of its internationally wrongful act, in particular as they concern cessation and reparation. Part Three is entitled “The Implementation of the International Responsibility of a State”. It identifies the State or States which may react to an internationally wrongful act and specifies the modalities by which this may be done, including, in certain circumstances, by the taking of countermeasures as necessary to ensure cessation of the wrongful act and reparation for its consequences. Part Four contains certain general provisions applicable to the articles as a whole.

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Part One defines the general conditions necessary for State responsibility to arise. Chapter I lays down three basic principles for responsibility, from which the articles as a whole proceed. Chapter II defines the conditions under which conduct is attributable to the State. Chapter III spells out in general terms the conditions under which such conduct amounts to a breach of an international obligation of the State concerned. Chapter IV deals with certain exceptional cases where one State may be responsible for the conduct of another State not in conformity with an international obligation of the latter. Chapter V defines the circumstances precluding the wrongfulness for conduct not in conformity with the international obligations of a State.

Chapter I

General principles

Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Commentary

- (1) Article 1 states the basic principle underlying the articles as a whole, which is that a breach of international law by a State entails its international responsibility. An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both. Whether there has been an internationally wrongful act depends, first, on the requirements of the obligation which is said to have been breached and, secondly, on the framework conditions for such an act, which are set out in Part One. The term “international responsibility” covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State. The content of these new legal relations is specified in Part Two.
- (2) The Permanent Court of International Justice applied the principle set out in article 1 in a number of cases. For example in *Phosphates in Morocco*, the Permanent Court affirmed that when a State commits an internationally wrongful act against another State international

responsibility is established “immediately as between the two States”.³⁵ The International Court of Justice has applied the principle on several occasions, for example in the *Corfu Channel* case,³⁶ in the *Military and Paramilitary Activities* case,³⁷ and in the *Gabčíkovo-Nagymaros Project* case.³⁸ The Court also referred to the principle in the advisory opinions on *Reparation for Injuries*,³⁹ and on the *Interpretation of Peace Treaties (Second Phase)*,⁴⁰ in which it stated that “refusal to fulfil a treaty obligation involves international responsibility”.⁴¹ Arbitral tribunals have repeatedly affirmed the principle, for example in the *Claims of Italian Subjects Resident in Peru* cases,⁴² in the *Dickson Car Wheel Company* case,⁴³ in the *International Fisheries Company* case,⁴⁴ in the *British Claims in the Spanish Zone of Morocco* case,⁴⁵ and in the

³⁵ *Phosphates in Morocco, Preliminary Objections*, 1938, P.C.I.J., Series A/B, No. 74, p. 10, at p. 28. See also S.S. “*Wimbledon*”, 1923, P.C.I.J., Series A, No. 1, p. 15, at p. 30; *Factory at Chorzów, Jurisdiction*, 1927, P.C.I.J., Series A, No. 9, p. 21; *Factory at Chorzów, Merits*, 1928, P.C.I.J., Series A, No. 17, p. 29.

³⁶ *Corfu Channel, Merits*, I.C.J. Reports 1949, p. 4, at p. 23.

³⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14, at pp. 142, para. 283, 149, para. 292.

³⁸ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, at p. 38, para. 47.

³⁹ *Reparation for Injuries Suffered in the Service of the United Nations*, I.C.J. Reports 1949, p. 174, at p. 184.

⁴⁰ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase*, I.C.J. Reports 1950, p. 221.

⁴¹ *Ibid.*, at p. 228.

⁴² Seven of these awards, rendered in 1901, reiterated that “a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents ...”: *UNRIAA*, vol. XV, pp. 399, 401, 404, 407, 408, 409, 411 (1901).

⁴³ *UNRIAA*, vol. IV, p. 669, at p. 678 (1931).

⁴⁴ *Ibid.*, vol. IV, p. 691, at p. 701 (1931).

⁴⁵ According to the arbitrator, Max Huber, it is an indisputable principle that “responsibility is the necessary corollary of rights. All international rights entail international responsibility ...”; *UNRIAA*, vol. II, p. 615 (1925), at p. 641.

Armstrong Cork Company case.⁴⁶ In the *Rainbow Warrior* case,⁴⁷ the Arbitral Tribunal stressed that “any violation by a State of any obligation, of whatever origin, gives rise to State responsibility”.⁴⁸

(3) That every internationally wrongful act of a State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place, has been widely recognized, both before⁴⁹ and since⁵⁰ article 1 was first formulated by the Commission. It is true that there were early differences of opinion over the definition of the legal relationships arising from an internationally wrongful act. One approach, associated with Anzilotti, described the legal consequences deriving from an internationally wrongful act exclusively in terms of a binding bilateral relationship thereby established between the wrongdoing State and the injured State, in which the obligation of the former State to make reparation is set against the “subjective” right of the latter State to require reparation. Another view, associated with Kelsen, started from the idea that the legal order is a coercive order and saw the authorization accorded to the injured State to apply a coercive sanction against the responsible State as the primary legal consequence flowing directly from the

⁴⁶ According to the Italian-United States Conciliation Commission, no State may “escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law”: *UNRIAA*, vol. XIV, p. 159 (1953), at p. 163.

⁴⁷ *Rainbow Warrior (New Zealand/France)*, *UNRIAA*, vol. XX, p. 217 (1990).

⁴⁸ *Ibid.*, at p. 251, para. 75.

⁴⁹ See e.g. D. Anzilotti, *Corso di diritto internazionale* (4th edn.) Padua, CEDAM, (1955) vol. I, p. 385. W. Wengler, *Völkerrecht* (Berlin, Springer, 1964) vol. I, p. 499; G. I. Tunkin, *Teoria mezhdunarodnogo prava*, *Mezhduranodnye othoshenia* (Moscow, 1970), p. 470; E. Jiménez de Aréchaga, “International Responsibility”, in M. Sørensen (ed.), *Manual of Public International Law* (London, Macmillan 1968), p. 533.

⁵⁰ See e.g. I. Brownlie, *Principles of Public International Law* (5th edn.) (Oxford, Clarendon Press, 1998), p. 435; B. Conforti, *Diritto Internazionale* (4th edn.) (Milan, Editoriale Scientifica, 1995), p. 332; P. Daillier & A. Pellet, *Droit international public (Nguyen Quoc Dinh)* (6th edn.) (Paris, L.G.D.J., 1999), p. 742; P-M. Dupuy, *Droit international public* (3rd edn.) (Paris, Précis Dalloz, 1998), p. 414; R. Wolfrum, “Internationally Wrongful Acts”, in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam, North Holland, 1995), vol. II, p. 1398.

wrongful act.⁵¹ According to this view, general international law empowered the injured State to react to a wrong; the obligation to make reparation was treated as subsidiary, a way by which the responsible State could avoid the application of coercion. A third view, which came to prevail, held that the consequences of an internationally wrongful act cannot be limited either to reparation or to a “sanction”.⁵² In international law, as in any system of law, the wrongful act may give rise to various types of legal relations, depending on the circumstances.

(4) Opinions have also differed on the question whether the legal relations arising from the occurrence of an internationally wrongful act were essentially bilateral, i.e., concerned only the relations of the responsible State and the injured State *inter se*. Increasingly it has been recognized that some wrongful acts engage the responsibility of the State concerned towards several or many States or even towards the international community as a whole. A significant step in this direction was taken by the International Court in the *Barcelona Traction* case when it noted that:

“an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”⁵³

Every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations.

Among these the Court instanced “the outlawing of acts of aggression, and of genocide, as also ... the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.⁵⁴ In later cases the Court has reaffirmed this

⁵¹ See H. Kelsen (R.W. Tucker, ed.), *Principles of International Law* (New York, Holt, Rhinehart & Winston, 1966), p. 22.

⁵² See, e.g., R. Ago, “Le délit international”, *Recueil des cours*, vol. 68, (1939/II), p. 417 at pp. 430-440; H. Lauterpacht, *Oppenheim's International Law* (8th edn.) (London, Longmans, 1955), vol. I, pp. 352-354.

⁵³ *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33.

⁵⁴ *Ibid.* at p. 32, para. 34.

idea.⁵⁵ The consequences of a broader conception of international responsibility must necessarily be reflected in the articles which, although they include standard bilateral situations of responsibility, are not limited to them.

(5) Thus the term “international responsibility” in article 1 covers the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law, and whether they are centred on obligations of restitution or compensation or also give the injured State the possibility of responding by way of countermeasures.

(6) The fact that under article 1 every internationally wrongful act of a State entails the international responsibility of that State does not mean that other States may not also be held responsible for the conduct in question, or for injury caused as a result. Under chapter II the same conduct may be attributable to several States at the same time. Under chapter IV, one State may be responsible for the internationally wrongful act of another, for example if the act was carried out under its direction and control. Nonetheless the basic principle of international law is that each State is responsible for its own conduct in respect of its own international obligations.

(7) The articles deal only with the responsibility of States. Of course, as the International Court of Justice affirmed in the *Reparation for Injuries* case, the United Nations “is a subject of international law and capable of possessing international rights and duties ... it has the capacity to maintain its rights by bringing international claims”.⁵⁶ The Court has also drawn attention to the responsibility of the United Nations for the conduct of its organs or agents.⁵⁷ It may be that

⁵⁵ See *East Timor (Portugal v. Australia)*, I.C.J. Reports 1995, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996, p. 226, at p. 258, para. 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, I.C.J. Reports 1996, p. 595, at pp. 615-616, paras. 31-32.

⁵⁶ I.C.J. Reports 1949, p. 174, at p. 179.

⁵⁷ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Reports 1999, p. 62, at pp. 88-89, para. 66.

the notion of responsibility for wrongful conduct is a basic element in the possession of international legal personality. Nonetheless special considerations apply to the responsibility of other international legal persons, and these are not covered in the articles.⁵⁸

(8) As to terminology, the French term “fait internationalement illicite” is preferable to “délit” or other similar expressions which may have a special meaning in internal law. For the same reason, it is best to avoid, in English, such terms as “tort”, “delict” or “delinquency”, or in Spanish the term “delito”. The French term “fait internationalement illicite” is better than “acte internationalement illicite”, since wrongfulness often results from omissions which are hardly indicated by the term “acte”. Moreover, the latter term appears to imply that the legal consequences are intended by its author. For the same reasons, the term “hecho internacionalmente ilícito” is adopted in the Spanish text. In the English text, it is necessary to maintain the expression “internationally wrongful act”, since the French “fait” has no exact equivalent; nonetheless, the term “act” is intended to encompass omissions, and this is made clear in article 2.

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.

Commentary

(1) Article 1 states the basic principle that every internationally wrongful act of a State entails its international responsibility. Article 2 specifies the conditions required to establish the existence of an internationally wrongful act of the State, i.e. the constituent elements of such an act. Two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time.

⁵⁸ For the position of international organizations see article 57 and commentary.

(2) These two elements were specified, for example, by the Permanent Court of International Justice in the *Phosphates in Morocco* case.⁵⁹ The Court explicitly linked the creation of international responsibility with the existence of an “act being attributable to the State and described as contrary to the treaty right[s] of another State”.⁶⁰ The International Court has also referred to the two elements on several occasions. In the *Diplomatic and Consular Staff* case,⁶¹ it pointed out that, in order to establish the responsibility of Iran ...

“[f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.”⁶²

Similarly in the *Dickson Car Wheel Company* case, the Mexico-United States General Claims Commission noted that the condition required for a State to incur international responsibility is “that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard”.⁶³

(3) The element of attribution has sometimes been described as “subjective” and the element of breach as “objective”, but the articles avoid such terminology.⁶⁴ Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be “subjective”. For example article II of the Genocide Convention states that: “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such ...”. In other cases, the standard for breach of an obligation may be “objective”, in the sense that the

⁵⁹ *Phosphates in Morocco, Preliminary Objections, 1938, P.C.I.J., Series A/B, No. 74, p. 10.*

⁶⁰ *Ibid.*, at p. 28.

⁶¹ *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 3.*

⁶² *Ibid.*, at p. 29, para. 56. Cf. p. 41, para. 90. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986, p. 14, at pp. 117-118, para. 226; Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997, p. 7, at p. 54, para. 78.*

⁶³ *UNRIIAA*, vol. IV, p. 669 (1931), at p. 678.

⁶⁴ Cf. *Yearbook ... 1973*, vol. II, p. 179, para. 1.

advertence or otherwise of relevant State organs or agents may be irrelevant. Whether responsibility is “objective” or “subjective” in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different possible standards. Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.

(4) Conduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two. Moreover it may be difficult to isolate an “omission” from the surrounding circumstances which are relevant to the determination of responsibility. For example in the *Corfu Channel* case, the International Court of Justice held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence.⁶⁵ In the *Diplomatic and Consular Staff* case, the Court concluded that the responsibility of Iran was entailed by the “inaction” of its authorities which “failed to take appropriate steps”, in circumstances where such steps were evidently called for.⁶⁶ In other cases it may be the combination of an action and an omission which is the basis for responsibility.⁶⁷

⁶⁵ *Corfu Channel, Merits*, I.C.J. Reports 1949, p. 4, at pp. 22-23.

⁶⁶ *Diplomatic and Consular Staff*, I.C.J. Reports 1980, p. 3, at pp. 31-32, paras. 63, 67. See also *Velásquez Rodríguez, Inter-Am.Ct.H.R., Series C, No. 4* (1989), para. 170: “under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions ...”; *Affaire relative à l’acquisition de la nationalité polonaise*, UNRIIAA, vol. I, p. 425 (1924).

⁶⁷ For example, under article 4 of the Hague Convention (VIII) of 18 October 1907 Relative to the Laying of Automatic Submarine Contact Mines, a neutral Power which lays mines off its coasts but omits to give the required notice to other States parties would be responsible accordingly: see J.B. Scott, *The Proceedings of the Hague Peace Conferences: The Conference of 1907* (New York, Oxford University Press, 1920), vol. I, p. 643.

(5) For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State. The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An “act of the State” must involve some action or omission by a human being or group: “States can act only by and through their agents and representatives.”⁶⁸ The question is which persons should be considered as acting on behalf of the State, i.e. what constitutes an “act of the State” for the purposes of State responsibility.

(6) In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attribution of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State under one or other of the rules set out in chapter II.

(7) The second condition for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach of an international obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations. In its judgment on jurisdiction in the *Factory at Chorzów* case, the Permanent Court of International Justice used the words “breach of an engagement”.⁶⁹ It employed the same expression in its subsequent judgment on the merits.⁷⁰ The International Court of Justice referred explicitly to these words in the *Reparation for Injuries* case.⁷¹ The Arbitral Tribunal in the *Rainbow Warrior* affair, referred

⁶⁸ *German Settlers in Poland, 1923, P.C.I.J., Series B, No. 6, at p. 22.*

⁶⁹ *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9, p. 21.*

⁷⁰ *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17, p. 29.*

⁷¹ *Reparation for Injuries Suffered in the Service of the United Nations, I.C.J. Reports 1949, p. 174, at p. 184.*

to “any violation by a State of any obligation”.⁷² In practice, terms such as “non-execution of international obligations”, “acts incompatible with international obligations”, “violation of an international obligation” or “breach of an engagement” are also used.⁷³ All these formulations have essentially the same meaning. The phrase preferred in the articles is “breach of an international obligation” corresponding as it does to the language of article 36 (2) (c) of the Statute of the International Court.

(8) In international law the idea of breach of an obligation has often been equated with conduct contrary to the rights of others. The Permanent Court of International Justice spoke of an act “contrary to the treaty right[s] of another State” in its judgment in the *Phosphates in Morocco* case.⁷⁴ That case concerned a limited multilateral treaty which dealt with the mutual rights and duties of the parties, but some have considered the correlation of obligations and rights as a general feature of international law: there are no international obligations of a subject of international law which are not matched by an international right of another subject or subjects, or even of the totality of the other subjects (the international community as a whole). But different incidents may attach to a right which is held in common by all other subjects of international law, as compared with a specific right of a given State or States. Different States may be beneficiaries of an obligation in different ways, or may have different interests in respect of its performance. Multilateral obligations may thus differ from bilateral ones, in view of the diversity of legal rules and institutions and the wide variety of interests sought to be protected by them. But whether any obligation has been breached still raises the two basic questions identified in article 2, and this is so whatever the character or provenance of the obligation breached. It is a separate question who may invoke the responsibility arising from the breach of an obligation: this question is dealt with in Part Three.⁷⁵

⁷² *Rainbow Warrior (New Zealand/France)*, UNRIIA, vol. XX, p. 217 (1990), at p. 251, para. 75.

⁷³ At the 1930 League of Nations Codification Conference, the term “any failure ... to carry out the international obligations of the State” was adopted: *Yearbook ... 1956*, vol. II, p. 225.

⁷⁴ *Phosphates in Morocco, Preliminary Objections, 1938*, P.C.I.J., Series A/B, No. 74, p. 10, at p. 28.

⁷⁵ See also article 33 (2) and commentary.

(9) Thus there is no exception to the principle stated in article 2 that there are two necessary conditions for an internationally wrongful act - conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are also sufficient. It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, “damage” to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure. Whether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract.⁷⁶

(10) A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by “fault” one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.

(11) Article 2 introduces and places in the necessary legal context the questions dealt with in subsequent chapters of Part One. Subparagraph (a) - which states that conduct attributable to the State under international law is necessary for there to be an internationally wrongful act - corresponds to chapter II, while chapter IV deals with the specific cases where one State is responsible for the internationally wrongful act of another State. Subparagraph (b) - which states that such conduct must constitute a breach of an international obligation - corresponds to the general principles stated in chapter III, while chapter V deals with cases where the wrongfulness of conduct, which would otherwise be a breach of an obligation, is precluded.

⁷⁶ For examples of analysis of different obligations, see e.g. *Diplomatic and Consular Staff, I.C.J. Reports 1980*, p. 3, at pp. 30-33, paras. 62-68; *Rainbow Warrior, UNRIIAA*, vol. XX, p. 217 (1990), at pp. 266-267, paras. 107-110; WTO, Report of the Panel, *United States - Sections 301-310 of the Trade Act of 1974*, WTO doc. WT/DS152/R, 22 December 1999, paras. 7.41 ff.

(12) In subparagraph (a), the term “attribution” is used to denote the operation of attaching a given action or omission to a State. In international practice and judicial decisions, the term “imputation” is also used.⁷⁷ But the term “attribution” avoids any suggestion that the legal process of connecting conduct to the State is a fiction, or that the conduct in question is “really” that of someone else.

(13) In subparagraph (b), reference is made to the breach of an international obligation rather than a rule or a norm of international law. What matters for these purposes is not simply the existence of a rule but its application in the specific case to the responsible State. The term “obligation” is commonly used in international judicial decisions and practice and in the literature to cover all the possibilities. The reference to an “obligation” is limited to an obligation under international law, a matter further clarified in article 3.

Article 3

Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Commentary

(1) Article 3 makes explicit a principle already implicit in article 2, namely that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned. There are two elements to this. First, an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State’s own law. Secondly and most importantly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law. An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State’s internal law - even if, under that law, the State was actually bound to act in that way.

⁷⁷ See e.g., *Diplomatic and Consular Staff, I.C.J. Reports 1980*, p. 3, at p. 29, paras. 56, 58; *Military and Paramilitary Activities, I.C.J. Reports 1986*, p. 14, at p. 51, para. 86.

(2) As to the first of these elements, perhaps the clearest judicial decision is that of the Permanent Court in the *Treatment of Polish Nationals* case⁷⁸. The Court denied the Polish Government the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the constitution of the Free City of Danzig, on the ground that:

“... according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter’s Constitution, but only on international law and international obligations duly accepted ... [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force ... The application of the Danzig Constitution may ... result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law

However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City.”⁷⁹

(3) That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled. International judicial decisions leave no doubt on that subject. In particular, the Permanent Court expressly recognized the principle in its first judgment, in the *S.S. Wimbledon*.⁸⁰ The Court rejected the argument of the German Government that the passage of the ship through the Kiel Canal would have constituted a violation of the German neutrality orders, observing that:

“... a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace ... under article 380 of the Treaty of Versailles, it was [Germany’s] definite duty to allow [the passage of the *Wimbledon* through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this article.”⁸¹

⁷⁸ *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, 1932, P.C.I.J., Series A/B, No. 44, p. 4.

⁷⁹ Ibid., at pp. 24-25. See also “*Lotus*”, 1927, P.C.I.J., Series A, No. 10, at p. 24.

⁸⁰ *S.S. “Wimbledon”*, 1923, P.C.I.J., Series A, No. 1.

⁸¹ Ibid., at pp. 29-30.

The principle was reaffirmed many times:

“... it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.”⁸²

“... it is certain that France cannot rely on her own legislation to limit the scope of her international obligations.”⁸³

“... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.”⁸⁴

A different facet of the same principle was also affirmed in the Advisory Opinions on *Exchange of Greek and Turkish Populations*⁸⁵ and *Jurisdiction of the Courts of Danzig*.⁸⁶

(4) The International Court has often referred to and applied the principle.⁸⁷ For example in the *Reparation for Injuries* case,⁸⁸ it noted that “[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible... the Member cannot

⁸² *Greco-Bulgarian “Communities”*, 1930, *P.C.I.J.*, Series B, No. 17, at p. 32.

⁸³ *Free Zones of Upper Savoy and the District of Gex*, 1930, *P.C.I.J.*, Series A, No. 24, at p. 12; *Free Zones of Upper Savoy and the District of Gex*, 1932, *P.C.I.J.*, Series A/B, No. 46, p. 96, at p. 167.

⁸⁴ *Treatment of Polish Nationals*, 1932, *P.C.I.J.*, Series A/B, No. 44, p. 4, at p. 24.

⁸⁵ *Exchange of Greek and Turkish Populations*, 1925, *P.C.I.J.*, Series B, No. 10, at p. 20.

⁸⁶ *Jurisdiction of the Courts of Danzig*, 1928, *P.C.I.J.*, Series B, No. 15, at pp. 26-27. See also the observations of Lord Finlay in *Acquisition of Polish Nationality*, 1923, *P.C.I.J.*, Series B, No. 7, at p. 26.

⁸⁷ See *Fisheries*, *I.C.J. Reports* 1951, p. 116, at p. 132; *Nottebohm, Preliminary Objection*, *I.C.J. Reports* 1953, p. 111, at p. 123; *Application of the Convention of 1902 Governing the Guardianship of Infants*, *I.C.J. Reports* 1958, p. 55, at p. 67; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, *I.C.J. Reports* 1988, p. 12, at pp. 34-35, para. 57.

⁸⁸ *Reparation for Injuries Suffered in the Service of the United Nations*, *I.C.J. Reports* 1949, p. 174, at p. 180.

contend that this obligation is governed by municipal law”. In the *ELSI* case,⁸⁹ a Chamber of the Court emphasized this rule, stating that:

“Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.”⁹⁰

Conversely, as the Chamber explained:

“... the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness ... Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.”⁹¹

The principle has also been applied by numerous arbitral tribunals.⁹²

⁸⁹ *Elettronica Sicula S.p.A. (ELSI)*, I.C.J. Reports 1989, p. 15.

⁹⁰ Ibid., at p. 51, para. 73.

⁹¹ Ibid., at p. 74, para. 124.

⁹² See e.g., the “*Alabama*” arbitration (1872), in Moore, *International Arbitrations* vol. IV, p. 4144, at pp. 4156, 4157; *Norwegian Shipowners’ Claims (Norway/United States of America)*, UNRIIAA, vol. I, p. 309 (1922), at p. 331; *Tinoco case (United Kingdom/Costa Rica)*, ibid., vol. I, p. 371 (1923), at p. 386; *Shufeldt Claim*, ibid., vol. II, p. 1081 (1930), at p. 1098 (“... it is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter’s subject.”); *Wollemborg*, ibid., vol. XIV, p. 283 (1956), at p. 289; *Flegenheimer*, ibid., vol. XIV, p. 327 (1958), at p. 360.

(5) The principle was expressly endorsed in the work undertaken under the auspices of the League of Nations on the codification of State Responsibility,⁹³ as well as in the work undertaken under the auspices of the United Nations on the codification of the rights and duties of States and the law of treaties. The International Law Commission's Draft declaration on rights and duties of States, article 13, provided that:

“Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.”⁹⁴

(6) Similarly this principle was endorsed in the Vienna Convention on the Law of Treaties, article 27 of which provides that:

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.”⁹⁵

⁹³ In point I of the request for information sent to States by the Preparatory Committee for the 1930 Conference on State Responsibility it was stated:

“In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law.”

In their replies, States agreed expressly or implicitly with this principle: League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (LN doc. C.75.M.69.1929.V.), p. 16. During the debate at the Conference, States expressed general approval of the idea embodied in point I and the Third Committee of the 1930 Hague Conference adopted article 5 to the effect that “A State cannot avoid international responsibility by invoking the state of its municipal law.” (LN doc. C.351(c)M.145(c).1930.V; reproduced in *Yearbook ... 1956*, vol. II, p. 225).

⁹⁴ See G.A.Res. 375 (IV) of 6 December 1949. For the debate in the Commission, see *Yearbook ... 1949*, pp. 105-106, 150, 171. For the debate in the General Assembly see *G.A.O.R., Fourth Session, Sixth Committee*, 168th-173rd, 18-25 October 1949; 175th-183rd meetings, 27 October-3 November 1949; *G.A.O.R., Fourth Session, Plenary Meetings*, 270th meeting, 6 December 1949.

⁹⁵ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331. Article 46 of the Vienna Convention provides for the invocation of provisions of internal law regarding competence to conclude treaties in limited circumstances, viz., where the violation of such provisions “was manifest and concerned a rule of ... internal law of fundamental importance”.

(7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.

(8) As regards the wording of the rule, the formulation “The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law”, which is similar to article 5 of the draft adopted on first reading at the Hague Conference of 1930 and also to article 27 of the Vienna Convention on the Law of Treaties, has the merit of making it clear that States cannot use their internal law as a means of escaping international responsibility. On the other hand, such a formulation sounds like a rule of procedure and is inappropriate for a statement of principle. Issues of the invocation of responsibility belong to Part Three, whereas this principle addresses the underlying question of the origin of responsibility. In addition, there are many cases where issues of internal law are relevant to the existence or otherwise of responsibility. As already noted, in such cases it is international law which determines the scope and limits of any reference to internal law. This element is best reflected by saying, first, that the characterization of State conduct as internationally wrongful is governed by international law, and secondly by affirming that conduct which is characterized as wrongful under international law cannot be excused by reference to the legality of that conduct under internal law.

(9) As to terminology, in the English version the term “internal law” is preferred to “municipal law”, because the latter is sometimes used in a narrower sense, and because the Vienna Convention on the Law of Treaties speaks of “internal law”. Still less would it be appropriate to use the term “national law”, which in some legal systems refers only to the laws emanating from the central legislature, as distinct from provincial, cantonal or local authorities.

The principle in article 3 applies to all laws and regulations adopted within the framework of the State, by whatever authority and at whatever level.⁹⁶ In the French version the expression “droit interne” is preferred to “législation interne” and “loi interne”, because it covers all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions.

Chapter II

Attribution of conduct to a State

(1) In accordance with article 2, one of the essential conditions for the international responsibility of a State is that the conduct in question is attributable to the State under international law. Chapter II defines the circumstances in which such attribution is justified, i.e. when conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State.

(2) In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State.⁹⁷

⁹⁶ Cf. *LaGrand, (Germany v. United States of America), Provisional Measures, I.C.J. Reports 1999*, p. 9, at p. 16, para. 28.

⁹⁷ See e.g., I. Brownlie, *System of the Law of Nations: State Responsibility, (Part I)* (Oxford, Clarendon Press, 1983), pp. 132-166; D.D. Caron, “The Basis of Responsibility: Attribution and Other Trans-Substantive Rules”, in R. Lillich & D. Magraw (eds.), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Irvington-on-Hudson, Transnational Publishers, 1998), p. 109; L. Condorelli, “L’imputation à l’Etat d’un fait internationalement illicite: solutions classiques et nouvelles tendances”, *Recueil des cours ...*, vol. 189 (1984-VI), p. 9; H. Dipla, *La responsabilité de l’Etat pour violation des droits de l’homme - problèmes d’imputation* (Paris, Pedone, 1994); A.V. Freeman, “Responsibility of States for Unlawful Acts of Their Armed Forces”, *Recueil des cours ...*, vol. 88 (1956), p. 261; F. Przetacznik, “The International Responsibility of States for the Unauthorized Acts of their Organs”, *Sri Lanka Journal of International Law*, vol. 1 (1989), p. 151.

(3) As a corollary, the conduct of private persons is not as such attributable to the State. This was established, for example, in the *Tellini* case of 1923. The Council of the League of Nations referred to a special Committee of Jurists certain questions arising from an incident between Italy and Greece.⁹⁸ This involved the assassination on Greek territory of the Chairman and several members of an international commission entrusted with the task of delimiting the Greek-Albanian border. In reply to question five, the Committee stated that:

“The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.”⁹⁹

(4) The attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link of factual causality. As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise. But the different rules of attribution stated in chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.¹⁰⁰ In this respect there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct.

⁹⁸ League of Nations, *Official Journal*, 4th Year, No. 11 (November 1923), p. 1349.

⁹⁹ League of Nations, *Official Journal*, 5th Year, No. 4 (April 1924), p. 524. See also the *Janes* case, *UNRIIAA*, vol. IV, p. 82 (1925).

¹⁰⁰ See *United States Diplomatic and Consular Staff in Tehran*, *I.C.J. Reports* 1980, p. 3.

(5) The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State. Thus the head of State or government or the minister of foreign affairs is regarded as having authority to represent the State without any need to produce full powers.¹⁰¹ Such rules have nothing to do with attribution for the purposes of State responsibility. In principle, the State's responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs.¹⁰² Thus the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its government.

(6) In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government. But while the State remains free to determine its internal structure and functions through its own law and practice, international law has a distinct role. For example, the conduct of certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government.¹⁰³ Conduct engaged in by organs of the State in excess of their competence may also be attributed to the State under international law, whatever the position may be under internal law.¹⁰⁴

¹⁰¹ See arts. 7, 8, 46, 47, Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

¹⁰² The point was emphasized, in the context of federal States, in *LaGrand* (*Germany v. United States of America*), *Provisional Measures*, *I.C.J. Reports 1999*, p. 9, at p. 16, para. 28. It is not of course limited to federal States. See further article 5 and commentary.

¹⁰³ See commentary to article 4, para. (11); see also article 5 and commentary.

¹⁰⁴ See article 7 and commentary.

(7) The purpose of this chapter is to specify the conditions under which conduct is attributed to the State as a subject of international law for the purposes of determining its international responsibility. Conduct is thereby attributed to the State as a subject of international law and not as a subject of internal law. In internal law, it is common for the “State” to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or corporations may have separate legal personality under internal law, with separate accounts and separate liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.

(8) Chapter II consists of eight articles. Article 4 states the basic rule attributing to the State the conduct of its organs. Article 5 deals with conduct of entities empowered to exercise the governmental authority of a State, and article 6 deals with the special case where an organ of one State is placed at the disposal of another State and empowered to exercise the governmental authority of that State. Article 7 makes it clear that the conduct of organs or entities empowered to exercise governmental authority is attributable to the State even if it was carried out outside the authority of the organ or person concerned or contrary to instructions. Articles 8-11 then deal with certain additional cases where conduct, not that of a State organ or entity, is nonetheless attributed to the State in international law. Article 8 deals with conduct carried out on the instructions of a State organ or under its direction or control. Article 9 deals with certain conduct involving elements of governmental authority, carried out in the absence of the official authorities. Article 10 concerns the special case of responsibility in defined circumstances for the conduct of insurrectional movements. Article 11 deals with conduct not attributable to the State under one of the earlier articles which is nonetheless adopted by the State, expressly or by conduct, as its own.

(9) These rules are cumulative but they are also limitative. In the absence of a specific undertaking or guarantee (which would be a *lex specialis*¹⁰⁵), a State is not responsible for the conduct of persons or entities in circumstances not covered by this chapter. As the

¹⁰⁵ See article 55 and commentary.

Iran-United States Claims Tribunal has affirmed, “in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State”.¹⁰⁶ This follows already from the provisions of article 2.

Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Commentary

- (1) Paragraph 1 of article 4 states the first principle of attribution for the purposes of State responsibility in international law - that the conduct of an organ of the State is attributable to that State. The reference to a “State organ” covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State: this is made clear by the final phrase.
- (2) Certain acts of individuals or entities which do not have the status of organs of the State may be attributed to the State in international law, and these cases are dealt with in later articles of this chapter. But the rule is nonetheless a point of departure. It defines the core cases of attribution, and it is a starting point for other cases. For example, under article 8 conduct which is authorized by the State, so as to be attributable to it, must have been authorized by an organ of the State, either directly or indirectly.
- (3) That the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognized in international judicial decisions. In the *Moses* case, for example, a decision of a Mexico-United States Mixed Claims Commission, Umpire Lieber said: “An

¹⁰⁶ *Yeager v. Islamic Republic of Iran* (1987) 17 *Iran-U.S.C.T.R.* 92, at pp. 101-2.

officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority”.¹⁰⁷ There have been many statements of the principle since then.¹⁰⁸

(4) The replies by Governments to the Preparatory Committee for the 1930 Conference for the Codification of International Law¹⁰⁹ were unanimously of the view that the actions or omissions of organs of the State must be attributed to it. The Third Committee of the Conference adopted unanimously on first reading an article 1, which provided that international responsibility shall be incurred by a State as a consequence of “any failure on the part of its organs to carry out the international obligations of the State ...”¹¹⁰

(5) The principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility. It goes without saying that there is no category of organs specially designated for the commission of internationally wrongful acts, and virtually any State organ may be the author of such an act. The diversity of international obligations does not permit any general distinction between organs which can commit internationally wrongful acts and those which cannot. This is reflected in the closing words of paragraph 1, which clearly reflect the rule of international law in the matter.

(6) Thus the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of

¹⁰⁷ Moore, *International Arbitrations*, vol. III, p. 3127 (1871), at p. 3129.

¹⁰⁸ See e.g. *Claims of Italian Nationals Resident in Peru*, UNRIAA, vol. XV, p. 399 (1901) (*Chiessa* claim); p. 401 (*Sessarego* claim); p. 404 (*Sanguinetti* claim); p. 407 (*Vercelli* claim); p. 408 (*Queirolo* claim); p. 409 (*Roggero* claim); p. 411 (*Miglia* claim); *Salvador Commercial Company*, *ibid.*, vol. XV, p. 455 (1902), at p. 477; *Finnish Shipowners (Great Britain/Finland)*, UNRIAA, vol. III, p. 1479 (1934), at p. 1501.

¹⁰⁹ League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (Doc. C.75.M.69.1929.V.), pp. 25, 41, 52; *Supplement to Volume III: Replies made by the Governments to the Schedule of Points; Replies of Canada and the United States of America* (Doc C.75(a)M.69(a).1929.V.), pp. 2-3, 6.

¹¹⁰ Reproduced in *Yearbook ... 1956*, vol. II, p. 225, Annex 3.

whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs. Thus, in the *Salvador Commercial Company* case, the Tribunal said that:

“... a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.”¹¹¹

The International Court has also confirmed the rule in categorical terms. In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, it said:

“According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule... is of a customary character...”¹¹²

In that case the Court was principally concerned with decisions of State courts, but the same principle applies to legislative and executive acts.¹¹³ As the Permanent Court said in *Certain German Interests in Polish Upper Silesia (Merits)* ...

¹¹¹ UNRIAA, vol. XV, p. 455 (1902), at p. 477. See also *Chattin* case, UNRIAA, vol. IV, p. 282 (1927), at p. 285-86; *Dispute concerning the interpretation of article 79 of the Treaty of Peace*, UNRIAA, vol. XIII, p. 389 (1955), at p. 438.

¹¹² *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Reports 1999, p. 62, at p. 87, para. 62, referring to the Draft Articles on State Responsibility, art. 6, now embodied in art. 4.

¹¹³ As to legislative acts see e.g. *German Settlers in Poland*, 1923, P.C.I.J., Series B, No. 6, at p. 35-36; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, 1932, P.C.I.J., Series A/B, No. 44, p. 4, at pp. 24-25; *Phosphates in Morocco, Preliminary Objections*, 1938, P.C.I.J., Series A/B, No. 74, p. 10, at pp. 25-26; *Rights of Nationals of the United States of America in Morocco*, I.C.J. Reports 1952, p. 176, at pp. 193-194. As to executive acts see e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14; *Elettronica Sicula S.p.A. (ELSI)*, I.C.J. Reports 1989, p. 15. As to judicial acts see e.g. “*Lotus*”, 1927, P.C.I.J., Series A, No. 10, at p. 24; *Jurisdiction of the Courts of Danzig*, 1928, P.C.I.J., Series B, No. 15, at p. 24; *Ambatielos*, Merits, I.C.J. Reports 1953, p. 10, at pp. 21-22. In some cases, the conduct in question may involve both executive and judicial acts; see e.g. *Application of the Convention of 1902 Governing the Guardianship of Infants*, I.C.J. Reports 1958, p. 55, at p. 65.

“From the standpoint of International Law and of the Court which is its organ, municipal laws ... express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.”¹¹⁴

Thus article 4 covers organs, whether they exercise “legislative, executive, judicial or any other functions”. This language allows for the fact that the principle of the separation of powers is not followed in any uniform way, and that many organs exercise some combination of public powers of a legislative, executive or judicial character. Moreover the term is one of extension, not limitation, as is made clear by the words “or any other functions”.¹¹⁵ It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as “commercial” or as “*acta iure gestionis*”. Of course the breach by a State of a contract does not as such entail a breach of international law.¹¹⁶ Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4,¹¹⁷ and it might in certain circumstances amount to an internationally wrongful act.¹¹⁸

(7) Nor is any distinction made at the level of principle between the acts of “superior” and “subordinate” officials, provided they are acting in their official capacity. This is expressed in the phrase “whatever position it holds in the organization of the State” in article 4. No doubt

¹¹⁴ *Certain German Interests in Polish Upper Silesia, Merits, 1926, P.C.I.J., Series A, No. 7*, at p. 19.

¹¹⁵ These functions might involve, e.g., the giving of administrative guidance to the private sector. Whether such guidance involves a breach of an international obligation may be an issue, but as “guidance” it is clearly attributable to the State. See, e.g., G.A.T.T., *Japan - Trade in Semi-conductors*, Panel Report of 24 March 1988, paras. 110-111; WTO, *Japan - Measures affecting Consumer Photographic Film and Paper*, Panel Report WT/DS44, paras. 10.12-10.16.

¹¹⁶ See article 3 and commentary.

¹¹⁷ See e.g. the decisions of the European Court of Human Rights in the *Swedish Engine Drivers' Union Case, E.C.H.R., Series A, No. 20* (1976), at p. 14; and *Schmidt and Dahlström, E.C.H.R., Series A, No. 21* (1976), at p. 15.

¹¹⁸ The irrelevance of the classification of the acts of State organs as *iure imperii* or *iure gestionis* was affirmed by all those members of the Sixth Committee who responded to a specific question on this issue from the Commission: see *Report of the I.L.C ... 1998 (A/53/10)*, para. 35.

lower level officials may have a more restricted scope of activity and they may not be able to make final decisions. But conduct carried out by them in their official capacity is nonetheless attributable to the State for the purposes of article 4. Mixed commissions after the Second World War often had to consider the conduct of minor organs of the State, such as administrators of enemy property, mayors and police officers, and consistently treated the acts of such persons as attributable to the State.¹¹⁹

(8) Likewise, the principle in article 4 applies equally to organs of the central government and to those of regional or local units. This principle has long been recognized. For example the Franco-Italian Conciliation Commission in the *Heirs of the Duc de Guise* case said:

“For the purposes of reaching a decision in the present case it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian Republic.”¹²⁰

This principle was strongly supported during the preparatory work for the Conference for the Codification of International Law of 1930. Governments were expressly asked whether the State became responsible as a result of “[a]cts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, etc.)”. All answered in the affirmative.¹²¹

¹¹⁹ See, e.g., the *Currie* case, *UNRIAA*, vol. XIV, p. 21 (1954), at p. 24; *Dispute concerning the interpretation of article 79 of the Italian Peace Treaty*, *UNRIAA*, vol. XIII, p. 389 (1955), at pp. 431-432; *Mossé* case, *ibid.*, vol. XIII, p. 486 (1953), at pp. 492-493. For earlier decisions see the *Roper* case, *UNRIAA*, vol. IV, p. 145 (1927); *Massey*, *ibid.*, vol. IV, p. 155 (1927); *Way*, *ibid.*, vol. IV, p. 391 (1928), at p. 400; *Baldwin*, *UNRIAA*, vol. VI, p. 328 (1933). Cf. also the consideration of the requisition of a plant by the Mayor of Palermo in *Elettronica Sicula S.p.A. (ELSI)*, *I.C.J. Reports 1989*, p. 15, e.g. at p. 50, para. 70.

¹²⁰ *UNRIAA*, vol. XIII, p. 150 (1951), at p. 161. For earlier decisions, see e.g. the *Pieri Dominique and Co.* case, *UNRIAA*, vol. X, p. 139 (1905), at 156.

¹²¹ League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (Doc. C.75.M.69.1929.V.), p. 90; *Supplement to Vol. III: Replies made by the Governments to the Schedule of Points: Replies of Canada and the United States of America* (Doc. C.75(a).M.69(a). 1929.V.), pp. 3, 18.

(9) It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations. The award in the *Montijo* case is the starting point for a consistent series of decisions to this effect.¹²² The France/Mexico Claims Commission in the *Pellat* case reaffirmed "the principle of the international responsibility ... of a federal State for all the acts of its separate States which give rise to claims by foreign States" and noted specially that such responsibility "...cannot be denied, not even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law".¹²³ That rule has since been consistently applied. Thus for example in the *LaGrand* case, the International Court said:

"Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States..."¹²⁴

¹²² See Moore, *International Arbitrations*, vol. II, p. 1421 (1875), at p. 1440. See also *De Brissot and others*, Moore, *International Arbitrations*, vol. III, pp. 2967 (1855), at pp. 2970-2971; *Pieri Dominique and Co.*, *UNRIAA*, vol. X, p. 139 (1905), at pp. 156-157; *Davy* case, *UNRIAA*, vol. IX, p. 467 (1903), at p. 468; *Janes* case, *UNRIAA*, vol. IV, p. 82 (1925), at p. 86; *Swinney*, *ibid.* vol. IV, p. 98 (1925), at p. 101; *Quintanilla*, *ibid.*, vol. IV, p. 101 (1925), at p. 103; *Youmans*, *ibid.*, vol. IV, p. 110 (1925), at p. 116; *Mallén*, *ibid.*, vol. IV, p. 173 (1925), at p. 177; *Venable*, *ibid.*, vol. IV, p. 218 (1925), at p. 230; *Tribolet*, *ibid.*, vol. IV, p. 598 (1925), at p. 601.

¹²³ *UNRIAA*, vol. V, p. 534 (1929), at p. 536.

¹²⁴ *LaGrand (Germany v. United States of America)*, *Provisional Measures*, *I.C.J. Reports* 1999, p. 9, at p. 16, para. 28. See also the judgment of 27 June 2001, para. 81.

(10) The reasons for this position are reinforced by the fact that federal States vary widely in their structure and distribution of powers, and that in most cases the constituent units have no separate international legal personality of their own (however limited), nor any treaty-making power. In those cases where the constituent unit of a federation is able to enter into international agreements on its own account,¹²⁵ the other party may well have agreed to limit itself to recourse against the constituent unit in the event of a breach. In that case the matter will not involve the responsibility of the federal State and will fall outside the scope of the present articles. Another possibility is that the responsibility of the federal State under a treaty may be limited by the terms of a federal clause in the treaty.¹²⁶ This is clearly an exception to the general rule, applicable solely in relations between the States parties to the treaty and in the matters which the treaty covers. It has effect by virtue of the *lex specialis* principle, dealt with in article 55.

(11) Paragraph 2 explains the relevance of internal law in determining the status of a State organ. Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of “organs”. In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an “organ”, internal law will not itself perform the task of classification. Even if it does so, the term “organ” used in internal law may have a special meaning, and not the very broad meaning it has under article 4. For example, under some legal systems the term “government” refers only to bodies at the highest level such as the head of State and the cabinet of ministers. In others, the police have a special status, independent of the executive; this cannot mean that for international law purposes they are not organs of the

¹²⁵ See e.g. arts. 56 (3), 172 (3) of the Constitution of the Swiss Confederation, 18 April 1999.

¹²⁶ See e.g. Convention for the Protection of the World Cultural and Natural Heritage, Paris, United Nations, *Treaty Series*, vol. 1037, p. 151, art. 34.

State.¹²⁷ Accordingly, a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word “includes” in paragraph 2.

(12) The term “person or entity” is used in article 4, paragraph 2, as well as in articles 5 and 7. It is used to include in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority, etc. The term “entity” is used in a similar sense in the draft articles on Jurisdictional immunities of States and their property, adopted in 1991.¹²⁸

(13) Although the principle stated in article 4 is clear and undoubted, difficulties can arise in its application. A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State. The distinction between unauthorized conduct of a State organ and purely private conduct has been clearly drawn in international arbitral decisions. For example, the award of the United States/Mexico General Claims Commission in the *Mallén* case (1927) involved, first, the act of an official acting in a private capacity, and secondly, another act committed by the same official in his official capacity, although in an abusive way.¹²⁹ The latter action was, and the former was not, held attributable to the State. The French-Mexican Claims Commission in the *Caire* case excluded responsibility only in cases where “the act had no connexion with the official function and was, in fact, merely the act of a private individual”.¹³⁰ The case of purely private conduct should not be confused with that of an organ functioning as such but acting *ultra*

¹²⁷ See e.g. the *Church of Scientology* case in the German Bundesgerichtshof, Judgment of 26 September 1978, *VI ZR 267/76*, *N.J.W.* 1979, p. 1101; *I.L.R.*, vol. 65, p. 193; *Propend Finance Pty. Ltd. v. Sing*, (1997) *I.L.R.*, vol. 111, p. 611 (C.A., England). These were State immunity cases, but the same principle applies in the field of State responsibility.

¹²⁸ *Yearbook... 1991*, vol. II Part Two, pp. 14-18.

¹²⁹ *UNRIAA*, vol. IV, p. 173 (1927), at p. 175.

¹³⁰ *UNRIAA*, vol. V, p. 516 (1929), at p. 531. See also the *Bensley* case (1850), in Moore, *International Arbitrations*, vol. III, p. 3018 (“a wanton trespass... under no color of official proceedings, and without any connexion with his official duties”); *Castelains*, Moore, *International Arbitrations*, vol. III, pp. 2999 (1880). See further article 7 and commentary.

vires or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State: this principle is affirmed in article 7.¹³¹ In applying this test, of course, each case will have to be dealt with on the basis of its own facts and circumstances.

Article 5

Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Commentary

- (1) Article 5 deals with the attribution to the State of conduct of bodies which are not State organs in the sense of article 4, but which are nonetheless authorized to exercise governmental authority. The article is intended to take account of the increasingly common phenomenon of para-statal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.
- (2) The generic term “entity” reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine. In one case before the Iran-United States Claims Tribunal, an autonomous foundation established by the

¹³¹ See further commentary to article 7, paragraph (7).

State held property for charitable purposes under close governmental control; its powers included the identification of property for seizure. It was held that it was a public and not a private entity, and therefore within the Tribunal's jurisdiction; with respect to its administration of allegedly expropriated property, it would in any event have been covered by article 5.¹³²

(3) The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control - these are not decisive criteria for the purpose of attribution of the entity's conduct to the State.

Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.

(4) Para-statal entities may be considered a relatively modern phenomenon, but the principle embodied in article 5 has been recognized for some time. For example the replies to the request for information made by the Preparatory Committee for the 1930 Codification Conference indicated strong support from some governments for the attribution to the State of the conduct of autonomous bodies exercising public functions of an administrative or legislative character. The German Government, for example, asserted that:

“when, by delegation of powers, bodies act in a public capacity, e.g., police an area ... the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies”.¹³³

¹³² *Hyatt International Corporation v. Government of the Islamic Republic of Iran* (1985) 9 *Iran-U.S.C.T.R.* 72, at pp. 88-94.

¹³³ League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (Doc. C.75.M.69.1929.V.), p. 90. The German Government noted that these remarks would extend to the situation where “the State, as an exceptional measure, invests private organizations with public powers and duties or authorities [sic] them to exercise sovereign rights, as in the case of private railway companies permitted to maintain a police force”; *ibid.*

The Preparatory Committee accordingly prepared the following Basis of Discussion, though the Third Committee of the Conference was unable in the time available to examine it:

“A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such ... autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State”.¹³⁴

(5) The justification for attributing to the State under international law the conduct of “para-statal” entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling-stock).

(6) Article 5 does not attempt to identify precisely the scope of “governmental authority” for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as “governmental” depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.

(7) The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority. This is to be distinguished from situations where an entity acts under the direction or control of the State, which are covered by article 8, and those where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 9. For the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State. On the other hand article 5 does not extend to cover,

¹³⁴ *Ibid.*, p. 92.

for example, situations where internal law authorizes or justifies certain conduct by way of self-help or self-defence; i.e. where it confers powers upon or authorizes conduct by citizens or residents generally. The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category.

Article 6

Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Commentary

- (1) Article 6 deals with the limited and precise situation in which an organ of a State is effectively put at the disposal of another State so that the organ may temporarily act for its benefit and under its authority. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.
- (2) The words “placed at the disposal of” in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving and not of the sending State. The notion of an organ “placed at the disposal of” the receiving State is a specialized one, implying that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed. In performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State. Thus article 6 is not concerned with ordinary situations of interstate cooperation or collaboration, pursuant to treaty or otherwise.¹³⁵

¹³⁵ Thus conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to Albania: *Xhavara & others v. Italy & Albania*, Application Nos. 39473-98, E.C.H.R., decision of 11 January 2001. Conversely conduct of Turkey taken in the context of the E.C.-Turkey customs union was still attributable to Turkey: see WTO, *Turkey - Restrictions on Imports of Textile and Clothing Products*, Panel Report, WT/DS34/R, 31 May 1999, paras. 9.33-9.44.

(3) Examples of situations that could come within this limited notion of a State organ “placed at the disposal” of another State might include a section of the health service or some other unit placed under the orders of another country to assist in overcoming an epidemic or natural disaster, or judges appointed in particular cases to act as judicial organs of another State. On the other hand, mere aid or assistance offered by organs of one State to another on the territory of the latter is not covered by article 6. For example armed forces may be sent to assist another State in the exercise of the right of collective self-defence or for other purposes. Where the forces in question remain under the authority of the sending State, they exercise elements of the governmental authority of that State and not of the receiving State. Situations can also arise where the organ of one State acts on the joint instructions of its own and another State, or there may be a single entity which is a joint organ of several States. In these cases, the conduct in question is attributable to both States under other articles of this chapter.¹³⁶

(4) Thus what is crucial for the purposes of article 6 is the establishment of a functional link between the organ in question and the structure or authority of the receiving State. The notion of an organ “placed at the disposal” of another State excludes the case of State organs, sent to another State for the purposes of the former State or even for shared purposes, which retain their own autonomy and status: for example, cultural missions, diplomatic or consular missions, foreign relief or aid organizations. Also excluded from the ambit of article 6 are situations in which functions of the “beneficiary” State are performed without its consent, as when a State placed in a position of dependence, territorial occupation or the like is compelled to allow the acts of its own organs to be set aside and replaced to a greater or lesser extent by those of the other State.¹³⁷

(5) There are two further criteria that must be met for article 6 to apply. First, the organ in question must possess the status of an organ of the sending State; and secondly its conduct must involve the exercise of elements of the governmental authority of the receiving State. The first

¹³⁶ See also article 47 and commentary.

¹³⁷ For the responsibility of a State for directing, controlling or coercing the internationally wrongful act of another see articles 17 and 18 and commentaries.

of these conditions excludes from the ambit of article 6 the conduct of private entities or individuals which have never had the status of an organ of the sending State. For example, experts or advisors placed at the disposal of a State under technical assistance programs usually do not have the status of organs of the sending State. The second condition is that the organ placed at the disposal of a State by another State must be “acting in the exercise of elements of the governmental authority” of the receiving State. There will only be an act attributable to the receiving State where the conduct of the loaned organ involves the exercise of the governmental authority of that State. By comparison with the number of cases of cooperative action by States in fields such as mutual defence, aid and development, article 6 covers only a specific and limited notion of “transferred responsibility”. Yet in State practice the situation is not unknown.

(6) In the *Chevreau* case,¹³⁸ a British consul in Persia, temporarily placed in charge of the French consulate, lost some papers entrusted to him. On a claim being brought by France, Arbitrator Beichmann held that “the British Government cannot be held responsible for negligence by its Consul in his capacity as the person in charge of the Consulate of another Power.”¹³⁹ It is implicit in the Arbitrator’s finding that the agreed terms on which the British Consul was acting contained no provision allocating responsibility for the consul’s acts. If a third State had brought a claim, the proper respondent in accordance with article 6 would have been the State on whose behalf the conduct in question was carried out.

(7) Similar issues were considered by the European Commission of Human Rights in two cases relating to the exercise by Swiss police in Liechtenstein of “delegated” powers.¹⁴⁰ At the relevant time Liechtenstein was not a party to the European Convention, so that if the conduct was attributable only to Liechtenstein no breach of the Convention could have occurred. The Commission held the case admissible, on the basis that under the treaty governing the relations between Switzerland and Liechtenstein of 1923, Switzerland exercised its own customs and immigration jurisdiction in Liechtenstein, albeit with the latter’s consent and in their mutual

¹³⁸ *UNRIIAA*, vol. II, p. 1113 (1931).

¹³⁹ *Ibid.*, at p. 1141.

¹⁴⁰ *X and Y v. Switzerland*, (Joined Apps. 7289/75 and 7349/76), (1977) 9 *D.R.* 57; 20 *Yearbook E.C.H.R.*, 372, at pp. 402-406.

interest. The officers in question were governed exclusively by Swiss law and were considered to be exercising the public authority of Switzerland. In that sense, they were not “placed at the disposal” of the receiving State.¹⁴¹

(8) A further, long-standing example, of a situation to which article 6 applies is the Judicial Committee of the Privy Council, which has acted as the final court of appeal for a number of independent States within the Commonwealth. Decisions of the Privy Council on appeal from an independent Commonwealth State will be attributable to that State and not to the United Kingdom. The Privy Council’s role is paralleled by certain final courts of appeal acting pursuant to treaty arrangements.¹⁴² There are many examples of judges seconded by one State to another for a time: in their capacity as judges of the receiving State, their decisions are not attributable to the sending State, even if it continues to pay their salaries.

(9) Similar questions could also arise in the case of organs of international organizations placed at the disposal of a State and exercising elements of that State’s governmental authority. This is even more exceptional than the interstate cases to which article 6 is limited. It also raises difficult questions of the relations between States and international organizations, questions which fall outside the scope of these Articles. Article 57 accordingly excludes from the ambit of the articles all questions of the responsibility of international organizations or of a State for the acts of an international organization. By the same token, article 6 does not concern those cases where, for example, accused persons are transferred by a State to an international institution pursuant to treaty.¹⁴³ In cooperating with international institutions in such a case, the State concerned does not assume responsibility for their subsequent conduct.

¹⁴¹ See also *Drozdz and Janousek v. France and Spain*, *E.C.H.R., Series A, No. 240* (1992) at paras. 96, 110. See also *Comptroller and Auditor-General v. Davidson*, (1996) *I.L.R.*, vol. 104, p. 526 (Court of Appeal, New Zealand), at pp. 536-537 (Cooke, P.), and at pp. 574-576 (Richardson, J.). An appeal to the Privy Council on other grounds was dismissed: *I.L.R.*, vol. 108, p. 622.

¹⁴² E.g. the Agreement between Nauru and Australia relating to Appeals to the High Court of Australia from the Supreme Court of Nauru, United Nations, *Treaty Series*, vol. 1216, p. 151.

¹⁴³ See, e.g., Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, art. 89.

Article 7

Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Commentary

- (1) Article 7 deals with the important question of unauthorized or *ultra vires* acts of State organs or entities. It makes it clear that the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions.
- (2) The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question.¹⁴⁴ Any other rule would contradict the basic principle stated in article 3, since otherwise a State could rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it.
- (3) The rule evolved in response to the need for clarity and security in international relations. Despite early equivocal statements in diplomatic practice and by arbitral tribunals,¹⁴⁵ State practice came to support the proposition, articulated by the British Government in response to an Italian request, that “all Governments should always be held responsible for all acts committed

¹⁴⁴ See e.g. the “Star and Herald” controversy, Moore, *Digest*, vol. VI, p. 775.

¹⁴⁵ In a number of early cases, international responsibility was attributed to the State for the conduct of officials without making it clear whether the officials had exceeded their authority: see, e.g., “*The Only Son*”, Moore, *International Arbitrations*, vol. IV, pp. 3404, at pp. 3404-3405; “*The William Lee*”, *ibid*, vol. IV, p. 3405; the *Donougho*, Moore, *International Arbitrations*, vol. III, p. 3012 (1876). Where the question was expressly examined tribunals did not consistently apply any single principle: see, e.g., *Collector of Customs: Lewis’s Case*, *ibid.*, vol. III, p. 3019; the *Gadino* case, *UNRIAA*, vol. XV, p. 414 (1901); “*The Lacaze*”, de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. II, p. 290, at pp. 297-298; “*The William Yeaton*”, Moore, *International Arbitrations*, vol. III, p. 2944, at p. 2946.

by their agents by virtue of their official capacity”.¹⁴⁶ As the Spanish Government pointed out: “If this were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received.”¹⁴⁷ At this time the United States supported “a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but of their apparent authority”.¹⁴⁸ It is probable that the different formulations had essentially the same effect, since acts falling outside the scope of both real and apparent authority would not be performed “by virtue of ... official capacity”. In any event, by the time of the Hague Codification Conference in 1930, a majority of States responding to the Preparatory Committee’s request for information were clearly in favour of the broadest formulation of the rule, providing for attribution to the State in the case of “[a]cts of officials in the national territory in their public capacity (*actes de fonction*) but exceeding their authority”.¹⁴⁹ The Basis of Discussion prepared by the Committee reflected this view. The Third Committee of the Conference adopted an article on first reading in the following terms:

“International responsibility is... incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State”¹⁵⁰

¹⁴⁶ For the opinions of the British and Spanish Governments given in 1898 at the request of Italy in respect of a dispute with Peru see *Archivio del Ministero degli Affari esteri italiano*, serie politica P, No. 43.

¹⁴⁷ Note verbale by Duke Almodóvar del Rio, 4 July 1898, *ibid.*

¹⁴⁸ “American Bible Society” incident, statement of United States Secretary of State, 17 August 1885, Moore, *Digest*, vol. VI, p. 743; “Shine and Milligen”, Hackworth, *Digest*, vol. V, p. 575; “Miller”, Hackworth, *Digest*, vol. V, pp. 570-571.

¹⁴⁹ Point V, No. 2 (b), League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee* (Doc. C.75.M.69.1929.V.), Vol. III, p. 74; and *Supplement to Vol. III* (Doc. C.75 (a). M.69(a)1929.V.), pp. 3 and 17.

¹⁵⁰ *Ibid.*, p. 238. For a more detailed account of the evolution of the modern rule see *Yearbook ... 1975*, vol. II, pp. 61-70.

(4) The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists.¹⁵¹ It is confirmed, for example, in article 91 of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949,¹⁵² which provides that: “A Party to the conflict ... shall be responsible for all acts by persons forming part of its armed forces”: this clearly covers acts committed contrary to orders or instructions. The commentary notes that article 91 was adopted by consensus and “correspond[s] to the general principles of law on international responsibility”.¹⁵³

(5) A definitive formulation of the modern rule is found in the *Caire* case. The case concerned the murder of a French national by two Mexican officers who, after failing to extort money, took Caire to the local barracks and shot him. The Commission held ...

“that the two officers, even if they are deemed to have acted outside their competence ... and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.”¹⁵⁴

(6) International human rights courts and tribunals have applied the same rule. For example the Inter-American Court of Human Rights in the *Velásquez Rodríguez Case* said ...

“This conclusion [of a breach of the Convention] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts

¹⁵¹ For example, the 1961 revised draft by Special Rapporteur F.V. García Amador provided that “an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity”. *Yearbook ... 1961*, vol. II, p. 53.

¹⁵² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), United Nations, *Treaty Series*, vol. 1125, p. 3.

¹⁵³ International Committee of the Red Cross, *Commentary on the Additional Protocols* (Geneva, 1987), pp. 1053-1054.

¹⁵⁴ *UNRIAA*, vol. p. 516 (1929), at p. 531. For other statements of the rule see *Maal*, *UNRIAA*, vol. X, p. 730 (1903) at pp. 732-733; *La Masica*, *UNRIAA*, vol. XI, p. 549 (1916), at p. 560; *Youmans*, *UNRIAA*, vol. IV, p. 110 (1916), at p. 116; *Mallen*, *ibid.*, vol. IV (1925), p. 173, at

of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.”¹⁵⁵

(7) The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been “carried out by persons cloaked with governmental authority.”¹⁵⁶

(8) The problem of drawing the line between unauthorized but still “official” conduct, on the one hand, and “private” conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression “if the organ, person or entity acts in that capacity” in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State.¹⁵⁷ In short, the question is whether they were acting with apparent authority.

p. 177; *Stephens*, *ibid*, vol. IV, p. 265 (1927), at pp. 267-268; Way, *ibid*, vol. IV, p. 391 (1925), at pp. 400-01. The decision of the United States Court of Claims in *Royal Holland Lloyd v. United States*, 73 Ct. Cl. 722 (1931); A.D.P.I.L.C, vol 6, p. 442 is also often cited.

¹⁵⁵ *Inter-Am.Ct.H.R., Series C, No. 4* (1989), at para. 170; 95 *I.L.R.* 232, at p. 296.

¹⁵⁶ *Petrolane, Inc. v. Islamic Republic of Iran* (1991) 27 *Iran-U.S.C.T.R.* 64, at p. 92. See commentary to article 4, paragraph (13).

¹⁵⁷ One form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction. The Articles are not concerned with questions that would then arise as to the validity of the transaction (cf. Vienna Convention on the Law of Treaties, art. 50). So far as responsibility for the corrupt conduct is concerned, various

(9) As formulated, article 7 only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, i.e. only to those cases of attribution covered by articles 4, 5 and 6. Problems of unauthorized conduct by other persons, groups or entities give rise to distinct problems, which are dealt with separately under articles 8, 9 and 10.

(10) As a rule of attribution, article 7 is not concerned with the question whether the conduct amounted to a breach of an international obligation. The fact that instructions given to an organ or entity were ignored, or that its actions were *ultra vires*, may be relevant in determining whether or not the obligation has been breached, but that is a separate issue.¹⁵⁸ Equally, article 7 is not concerned with the admissibility of claims arising from internationally wrongful acts committed by organs or agents acting *ultra vires* or contrary to their instructions. Where there has been an unauthorized or invalid act under local law and as a result a local remedy is available, this will have to be resorted to, in accordance with the principle of exhaustion of local remedies, before bringing an international claim.¹⁵⁹

Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Commentary

(1) As a general principle, the conduct of private persons or entities is not attributable to the State under international law. Circumstances may arise, however, where such conduct is

situations could arise which it is not necessary to deal with expressly in the present Articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party, which would be properly resolved under article 7.

¹⁵⁸ See *Elettronica Sicula S.p.A. (ELSI)*, *I.C.J. Reports 1989*, p. 15, esp. at pp. 52, 62 and 74.

¹⁵⁹ See further article 44 (b) and commentary.

nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State. Article 8 deals with two such circumstances. The first involves private persons acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons act under the State's direction or control.¹⁶⁰ Bearing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account in both cases the existence of a real link between the person or group performing the act and the State machinery.

(2) The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence.¹⁶¹ In such cases it does not matter that the person or persons involved are private individuals nor whether their conduct involves "governmental activity". Most commonly cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighbouring countries, or who are instructed to carry out particular missions abroad.

(3) More complex issues arise in determining whether conduct was carried out "under the direction or control" of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.

¹⁶⁰ Separate issues are raised where one State engages in internationally wrongful conduct at the direction or under the control of another State: see article 17 and commentary, and especially para. (7) for the meaning of the words "direction" and "control" in various languages..

¹⁶¹ See, e.g., the *Zafiro* case, *UNRIAA*, vol. VI, p. 160 (1925); *Stephens*, *UNRIAA*, vol. IV, p. 265 (1927), at p. 267; *Lehigh Valley Railroad Company, and others (U.S.A.) v. Germany (Sabotage Cases)*: "Black Tom" and "Kingsland" incidents, *UNRIAA*, vol. VIII, p. 84 (1930); and *UNRIAA*, vol. VIII, p. 225 (1939), at p. 458.

(4) The degree of control which must be exercised by the State in order for the conduct to be attributable to it was a key issue in the *Military and Paramilitary* case.¹⁶² The question was whether the conduct of the *contras* was attributable to the United States so as to hold the latter generally responsible for breaches of international humanitarian law committed by the *contras*. This was analysed by the Court in terms of the notion of “control”. On the one hand, it held that the United States was responsible for the “planning, direction and support” given by United States to Nicaraguan operatives.¹⁶³ But it rejected the broader claim of Nicaragua that all the conduct of the *contras* was attributable to the United States by reason of its control over them. It concluded that:

“[D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf ... All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”¹⁶⁴

¹⁶² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14.

¹⁶³ Ibid., p. 51, para. 86.

¹⁶⁴ Ibid., pp. 62 and 64-65, paras. 109 and 115. See also the concurring opinion of Judge Ago, ibid., p. 189, para. 17.

Thus while the United States was held responsible for its own support for the *contras*, only in certain individual instances were the acts of the *contras* themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State.

(5) The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has also addressed these issues.¹⁶⁵ In *Prosecutor v. Tadić*, the Chamber stressed that:

“The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.”¹⁶⁶

The Appeals Chamber held that the requisite degree of control by the Yugoslavian authorities over these armed forces required by international law for considering the armed conflict to be international was “*overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations”.¹⁶⁷ In the course of their reasoning, the majority considered it necessary to disapprove the International Court’s approach in *Military and Paramilitary activities*. But the legal issues and the factual situation in that case were different from those facing the International Court in *Military and Paramilitary activities*. The Tribunal’s mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility

¹⁶⁵ Case IT-94-1, *Prosecutor v. Tadić*, (1999) *I.L.M.*, vol. 38, p. 1518. For the judgment of the Trial Chamber (1997), see *I.L.R.*, vol. 112, p. 1.

¹⁶⁶ Case IT-94-1, *Prosecutor v. Tadić*, (1999) *I.L.M.*, vol. 38, p. 1518, at p. 1541, para. 117 (emphasis in original).

¹⁶⁷ *Ibid.*, at p. 1546, para. 145 (emphasis in original).

but the applicable rules of international humanitarian law.¹⁶⁸ In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.¹⁶⁹

(6) Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the “corporate veil” is a mere device or a vehicle for fraud or evasion.¹⁷⁰ The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.¹⁷¹ Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the *de facto* seizure of property by a State-owned oil company, in a case where there was no proof that the State used its

¹⁶⁸ See the explanation given by Judge Shahabuddeen, *ibid.*, at pp. 1614-1615.

¹⁶⁹ The problem of the degree of State control necessary for the purposes of attribution of conduct to the State has also been dealt with, for example, by the Iran-United States Claims Tribunal: *Yeager v. Islamic Republic of Iran*, (1987) 17 *Iran-U.S.C.T.R.* 92, at p. 103. See also *Starrett Housing Corp. v. Government of the Islamic Republic of Iran* (1983) 4 *Iran-U.S.C.T.R.* 122, at p. 143, and by the European Court of Human Rights, *Loizidou v. Turkey, Merits*, *E.C.H.R. Reports*, 1996-VI, p. 2216, at pp. 2235-2236, para. 56. See also *ibid.*, at p. 2234, para. 52, and the decision on the preliminary objections: *E.C.H.R., Series A, No. 310* (1995), at para. 62.

¹⁷⁰ *Barcelona Traction, Light and Power Company, Limited, Second Phase*, *I.C.J. Reports* 1970, p. 3, at p. 39, para. 56-58.

¹⁷¹ E.g. the Workers’ Councils considered in *Schering Corporation v. Islamic Republic of Iran*, (1984) 5 *Iran-U.S.C.T.R.* 361; *Otis Elevator Co. v. Islamic Republic of Iran*, (1987) 14 *Iran-U.S.C.T.R.* 283; *Eastman Kodak Co. v. Islamic Republic of Iran*, (1987) 17 *Iran-U.S.C.T.R.* 153.

ownership interest as a vehicle for directing the company to seize the property.¹⁷² On the other hand, where there was evidence that the corporation was exercising public powers,¹⁷³ or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,¹⁷⁴ the conduct in question has been attributed to the State.¹⁷⁵

(7) It is clear then that a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of. In the text of article 8, the three terms “instructions”, “direction” and “control” are disjunctive; it is sufficient to establish any one of them. At the same time it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act.

(8) Where a State has authorized an act, or has exercised direction or control over it, questions can arise as to the State’s responsibility for actions going beyond the scope of the authorization. For example questions might arise if the agent, while carrying out lawful instructions or directions, engages in some activity which contravenes both the instructions or directions given and the international obligations of the instructing State. Such cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it. In general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way. On the other hand, where persons or groups have committed acts

¹⁷² *SEDCO, Inc. v. National Iranian Oil Co.*, (1987) 15 *Iran-U.S.C.T.R.* 23. See also *International Technical Products Corp. v. Islamic Republic of Iran*, (1985) 9 *Iran-U.S.C.T.R.* 206; *Flexi-Van Leasing, Inc. v. Islamic Republic of Iran*, (1986) 12 *Iran-U.S.C.T.R.* 335, at p. 349.

¹⁷³ *Phillips Petroleum Co. Iran v. Islamic Republic of Iran* (1989) 21 *Iran-U.S.C.T.R.* 79; *Petrolane, Inc. v. Government of the Islamic Republic of Iran* (1991) 27 *Iran-U.S.C.T.R.* 64.

¹⁷⁴ *Foremost Tehran, Inc. v. Islamic Republic of Iran* (1986) 10 *Iran-U.S.C.T.R.* 228; *American Bell International Inc. v. Islamic Republic of Iran* (1986) 12 *Iran-U.S.C.T.R.* 170.

¹⁷⁵ Cf. also *Hertzberg et al. v. Finland*, (Communication No. R.14/61), (1982), A/37/40, annex XIV, para. 9.1. See also *X v. Ireland*, (App. 4125/69), (1971) 14 *Yearbook E.C.H.R.* 198; *Young, James and Webster v. United Kingdom*, *E.C.H.R., Series A, No. 44* (1981).

under the effective control of a State the condition for attribution will still be met even if particular instructions may have been ignored. The conduct will have been committed under the control of the State and it will be attributable to the State in accordance with article 8.

(9) Article 8 uses the words “person or group of persons”, reflecting the fact that conduct covered by the article may be that of a group lacking separate legal personality but acting on a de facto basis. Thus while a State may authorize conduct by a legal entity such as a corporation, it may also deal with aggregates of individuals or groups that do not have legal personality but are nonetheless acting as a collective.

Article 9

Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Commentary

(1) Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase “in circumstances such as to call for”. Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, e.g., after foreign occupation.

(2) The principle underlying article 9 owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces:¹⁷⁶ in effect it is a form of agency of necessity. Instances continue to occur from time to time in the field of State

¹⁷⁶ This principle is recognized as legitimate by article 2 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land: J. B. Scott (ed.), *The Proceedings of the Hague Peace Conferences: The Conference of 1907* (New York, Oxford University Press, 1920), vol. I, p. 623; and by article 4, paragraph A (6), of the Geneva Convention of 12 August 1949 on the Treatment of Prisoners of War, United Nations, *Treaty Series*, vol. 75, p. 135.

responsibility. Thus the position of the Revolutionary Guards or “Komitehs” immediately after the revolution in the Islamic Republic of Iran was treated by the Iran-United States Claims Tribunal as covered by the principle expressed in article 9. *Yeager v. Islamic Republic of Iran* concerned, *inter alia*, the action of performing immigration, customs and similar functions at Tehran airport in the immediate aftermath of the revolution. The Tribunal held the conduct attributable to the Islamic Republic of Iran, on the basis that, if it was not actually authorized by the Government, then the Guards ...

“at least exercised elements of the governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object.”¹⁷⁷

(3) Article 9 establishes three conditions which must be met in order for conduct to be attributable to the State: first, the conduct must effectively relate to the exercise of elements of the governmental authority, secondly, the conduct must have been carried out in the absence or default of the official authorities, and thirdly, the circumstances must have been such as to call for the exercise of those elements of authority.

(4) As regards the first condition, the person or group acting must be performing governmental functions, though they are doing so on their own initiative. In this respect, the nature of the activity performed is given more weight than the existence of a formal link between the actors and the organization of the State. It must be stressed that the private persons covered by article 9 are not equivalent to a general *de facto* government. The cases envisaged by article 9 presuppose the existence of a government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general *de facto* government, on the other hand, is itself an apparatus of the State, replacing that which existed previously. The conduct of the organs of such a government is covered by article 4 rather than article 9.¹⁷⁸

¹⁷⁷ (1987) 17 *Iran-U.S.C.T.R.* 92 at p. 104, para. 43

¹⁷⁸ See e.g. the award by Arbitrator Taft in the *Aguilar-Amory and Royal Bank of Canada Claims (Timoco Case)*, *UNRIAA*, vol. 1, p. 371 (1923) at pp. 381-2. On the responsibility of the State for the conduct of *de facto* Governments, see also J.A. Frowein, *Das de facto-Regime im*

(5) In respect of the second condition, the phrase “in the absence or default of” is intended to cover both the situation of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality. The phrase “absence or default” seeks to capture both situations.

(6) The third condition for attribution under article 9 requires that the circumstances must have been such as to call for the exercise of elements of the governmental authority by private persons. The term “called for” conveys the idea that some exercise of governmental functions was called for, though not necessarily the conduct in question. In other words, the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise police or other functions in the absence of any constituted authority. There is thus a normative element in the form of agency entailed by article 9, and this distinguishes these situations from the normal principle that conduct of private parties, including insurrectionary forces, is not attributable to the State.¹⁷⁹

Article 10

Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.
3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Völkerrecht (Cologne, Heymanns, 1968), pp. 70-71. Conduct of a Government in exile might be covered by article 9, depending on the circumstances.

¹⁷⁹ See e.g. *Sambiaggio*, *UNRIAA*, vol. X, p. 499 (1904); and see further below, article 10 and commentary.

Commentary

(1) Article 10 deals with the special case of attribution to a State of conduct of an insurrectional or other movement which subsequently becomes the new government of the State or succeeds in establishing a new State.

(2) At the outset, the conduct of the members of the movement presents itself purely as the conduct of private individuals. It can be placed on the same footing as that of persons or groups who participate in a riot or mass demonstration and it is likewise not attributable to the State. Once an organized movement comes into existence as a matter of fact, it will be even less possible to attribute its conduct to the State, which will not be in a position to exert effective control over its activities. The general principle in respect of the conduct of such movements, committed during the continuing struggle with the constituted authority, is that it is not attributable to the State under international law. In other words, the acts of unsuccessful insurrectional movements are not attributable to the State, unless under some other article of chapter II, for example in the special circumstances envisaged by article 9.

(3) Ample support for this general principle is found in arbitral jurisprudence. International arbitral bodies, including mixed claims commissions¹⁸⁰ and arbitral tribunals¹⁸¹ have uniformly affirmed what Commissioner Nielsen in the *Solis* case described as a “well-established principle of international law”, that no government can be held responsible for the conduct of rebellious groups committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection.¹⁸² Diplomatic practice is remarkably consistent in recognizing that the conduct of an insurrectional movement cannot be attributed to the State. This can be seen, for example, from the preparatory work for the 1930 Codification Conference. Replies of Governments to point IX of the request for information

¹⁸⁰ See the decisions of the various mixed commissions: *Zuloaga and Miramon Governments*, Moore, *International Arbitrations*, vol. III, p. 2873; *McKenny*, *ibid.*, vol. III, p. 2881; *Confederate States*, *ibid.*, vol. III, p. 2886; *Confederate Debt*, *ibid.*, vol. III, p. 2900; *Maximilian Government*, Moore, *ibid.*, p. 2902, at pp. 2928-2929.

¹⁸¹ See e.g. *British Claims in the Spanish Zone of Morocco*, UNRIAA., vol. II, p. 615 (1925), at p. 642; *Several British Subjects (Iloilo Claims)*, UNRIAA., vol. VI, p. 158 (1925), at pp. 159-160.

¹⁸² UNRIAA., vol. IV, p. 358 (1928), at p. 361 (referring to *Home Missionary Society*, UNRIAA., vol. VI, p. 42 (1920); Cf. the *Sambiaggio* case, UNRIAA., vol. X, p. 499 (1903), at p. 524.

addressed to them by the Preparatory Committee indicated substantial agreement that: (a) the conduct of organs of an insurrectional movement could not be attributed as such to the State or entail its international responsibility; and (b) only conduct engaged in by organs of the State in connection with the injurious acts of the insurgents could be attributed to the State and entail its international responsibility, and then only if such conduct constituted a breach of an international obligation of that State.¹⁸³

(4) The general principle that the conduct of an insurrectional or other movement is not attributable to the State is premised on the assumption that the structures and organization of the movement are and remain independent of those of the State. This will be the case where the State successfully puts down the revolt. In contrast, where the movement achieves its aims and either installs itself as the new government of the State or forms a new State in part of the territory of the pre-existing State or in a territory under its administration, it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it. In these exceptional circumstances, article 10 provides for the attribution of the conduct of the successful insurrectional or other movement to the State. The basis for the attribution of conduct of a successful insurrectional or other movement to the State under international law lies in the continuity between the movement and the eventual government. Thus the term “conduct” only concerns the conduct of the movement as such and not the individual acts of members of the movement, acting in their own capacity.

(5) Where the insurrectional movement, as a new government, replaces the previous government of the State, the ruling organization of the insurrectional movement becomes the ruling organization of that State. The continuity which thus exists between the new organization of the State and that of the insurrectional movement leads naturally to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle. In such a case, the State does not cease to exist as a subject of international law. It remains the same State, despite the changes, reorganizations and adaptations which occur in its institutions. Moreover it is the only subject of international law to which responsibility can be attributed.

¹⁸³ League of Nations, Conference for the Codification of International Law, vol. III: *Bases of Discussion for the Conference drawn up by the Preparatory Committee* (Doc. C.75.M.69.1929.V.), p. 108; *Supplement to Volume III: Replies made by the Governments to the Schedule of Points: Replies of Canada and the United States of America* (Doc. C.75(a).M.69(a).1929.V.), pp. 3, 20.

The situation requires that acts committed during the struggle for power by the apparatus of the insurrectional movement should be attributable to the State, alongside acts of the then established government.

(6) Where the insurrectional or other movement succeeds in establishing a new State, either in part of the territory of the pre-existing State or in a territory which was previously under its administration, the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity between the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment, and this represents the accepted rule.

(7) Paragraph 1 of article 10 covers the scenario in which the insurrectional movement, having triumphed, has substituted its structures for those of the previous government of the State in question. The phrase “which becomes the new government” is used to describe this consequence. However, the rule in paragraph 1 should not be pressed too far in the case of governments of national reconciliation, formed following an agreement between the existing authorities and the leaders of an insurrectional movement. The State should not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed government. Thus the criterion of application of paragraph 1 is that of a real and substantial continuity between the former insurrectional movement and the new government it has succeeded in forming.

(8) Paragraph 2 of article 10 addresses the second scenario, where the structures of the insurrectional or other revolutionary movement become those of a new State, constituted by secession or decolonization in part of the territory which was previously subject to the sovereignty or administration of the predecessor State. The expression “or in any other territory under its administration” is included in order to take account of the differing legal status of different dependent territories.

(9) A comprehensive definition of the types of groups encompassed by the term “insurrectional movement” as used in article 10 is made difficult by the wide variety of forms which insurrectional movements may take in practice, according to whether there is relatively limited internal unrest, a genuine civil war situation, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter-revolutionary movements and so on. Insurrectional movements may be based in the territory of the State against which the movement’s actions are directed, or on the territory of a third State. Despite this diversity, the threshold for the application of the laws of armed conflict contained in Additional Protocol II of 1977 may be taken as a guide.¹⁸⁴ Article 1, paragraph 1 refers to “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”, and it contrasts such groups with “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar character” (article 1, para. 2). This definition of “dissident armed forces” reflects, in the context of the Protocols, the essential idea of an “insurrectional movement”.

(10) As compared with paragraph 1, the scope of the attribution rule articulated by paragraph 2 is broadened to include “insurrectional or other” movements. This terminology reflects the existence of a greater variety of movements whose actions may result in the formation of a new State. The words do not however extend to encompass the actions of a group of citizens advocating separation or revolution where these are carried out within the framework of the predecessor State. Nor does it cover the situation where an insurrectional movement within a territory succeeds in its agitation for union with another State. This is essentially a case of succession, and outside the scope of the articles, whereas article 10 focuses on the continuity of the movement concerned and the eventual new government or State, as the case may be.

¹⁸⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), United Nations, *Treaty Series*, vol. 1125, p. 609

(11) No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international “legitimacy” or of any illegality in respect of their establishment as a government, despite the potential importance of such distinctions in other contexts.¹⁸⁵ From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin.¹⁸⁶ Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law.

(12) Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10. The international arbitral decisions, e.g. those of the mixed commissions established in respect of Venezuela (1903) and Mexico (1920-1930), support the attribution of conduct by insurgents where the movement is successful in achieving its revolutionary aims. For example in the *Bolivar Railway Company* claim, the principle is stated in the following terms:

“The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented *ab initio* a changing national will, crystallizing in the finally successful result.”¹⁸⁷

¹⁸⁵ See H. Atlam, “International Liberation Movements and International Responsibility”, in B. Simma & M. Spinedi (eds.), *United Nations Codification of State Responsibility* (New York, Oceana, 1987), p. 35.

¹⁸⁶ As the Court said in the *Namibia* advisory opinion, “[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States”: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *I.C.J. Reports 1971*, p. 16, at p. 54, para. 118.

¹⁸⁷ *UNRIAA.*, vol. IX, p. 445 (1903), at p. 453. See also *Puerto Cabello and Valencia Railway Company*, *ibid.*, vol. IX, p. 510 (1903), at p. 513.

The French-Venezuelan Mixed Claims Commission in its decision concerning the *French Company of Venezuelan Railroads* emphasized that the State cannot be held responsible for the acts of revolutionaries “unless the revolution was successful”, since such acts then involve the responsibility of the State “under the well-recognized rules of public law”.¹⁸⁸ In the *Pinson* case, the French-Mexican Claims Commission ruled that ...

“if the injuries originated, for example, in requisitions or forced contributions demanded ... by revolutionaries before their final success, or if they were caused... by offenses committed by successful revolutionary forces, the responsibility of the State ... cannot be denied.”¹⁸⁹

(13) The possibility of holding the State responsible for conduct of a successful insurrectional movement was brought out in the request for information addressed to Governments by the Preparatory Committee for the 1930 Codification Conference.¹⁹⁰ On the basis of replies received from a number of governments, the Preparatory Committee of the Conference drew up the following Basis of Discussion: “A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops.”¹⁹¹ Although the proposition was never discussed, it may be considered to reflect the rule of attribution now contained in paragraph 2.

¹⁸⁸ *UNRIAA.*, vol. X, p. 285 (1902), at p. 354. See also *Dix* case, *UNRIAA*, vol. IX, p. 119 (1902).

¹⁸⁹ *UNRIAA.*, vol. V, p. 327 (1928), at p. 353.

¹⁹⁰ League of Nations, Conference for the Codification of International Law, vol. III: *Bases of Discussion for the Conference drawn up by the Preparatory Committee* (Doc. C.75.M.69.1929.V.), pp. 108, 116; reproduced in *Yearbook ... 1956*, vol. II, p. 223, at p. 224.

¹⁹¹ Basis of Discussion No. 22 (c), League of Nations, Conference for the Codification of International Law, Vol. III: *Bases of Discussion for the Conference drawn up by the Preparatory Committee* (Doc. C.75.M.69.1929.V.), p. 118; reproduced in *Yearbook ... 1956*, vol. II, p. 223, at p. 224.

(14) More recent decisions and practice do not, on the whole, give any reason to doubt the propositions contained in article 10. In one case the Supreme Court of Namibia went even further in accepting responsibility for “anything done” by the predecessor administration of South Africa.¹⁹²

(15) Exceptional cases may occur where the State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement’s conduct but improperly failed to do so. This possibility is preserved by paragraph 3 of article 10, which provides that the attribution rules of paragraphs 1 and 2 are without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of other provisions in chapter II. The term “however related to that of the movement concerned” is intended to have a broad meaning. Thus the failure by a State to take available steps to protect the premises of diplomatic missions, threatened from attack by an insurrectional movement, is clearly conduct attributable to the State and is preserved by paragraph 3.

(16) A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. The topic of the international responsibility of unsuccessful insurrectional or other movements, however, falls outside the scope of the present Articles, which are concerned only with the responsibility of States.

Article 11

Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

¹⁹² Guided in particular by a constitutional provision the Court held that “the new government inherits responsibility for the acts committed by the previous organs of the State”: *Minister of Defence, Namibia v. Mwandighi*, 1992 (2) SA 355 at p. 360; *I.L.R.*, vol. 91, p. 341, at p. 361. See on the other hand *44123 Ontario Ltd. v. Crispus Kiyonga*, (1992) 11 Kampala LR 14, at p. 20-1; *I.L.R.*, vol. 103, p. 259, at p. 266 (High Court, Uganda).

Commentary

(1) All the bases for attribution covered in chapter II, with the exception of the conduct of insurrectional or other movements under article 10, assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the alleged wrongful act. Article 11, by contrast, provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own.

(2) In many cases, the conduct which is acknowledged and adopted by a State will be that of private persons or entities. The general principle, drawn from State practice and international judicial decisions, is that the conduct of a person or group of persons not acting on behalf of the State is not considered as an act of the State under international law. This conclusion holds irrespective of the circumstances in which the private person acts and of the interests affected by the person's conduct.

(3) Thus like article 10, article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes "nevertheless" that conduct is to be considered as an act of a State "if and to the extent that the State acknowledges and adopts the conduct in question as its own". Instances of the application of the principle can be found in judicial decisions and State practice. For example, in the *Lighthouses* arbitration, a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been "endorsed by [Greece] as if it had been a regular transaction ... and eventually continued by her, even after the acquisition of territorial sovereignty over the island ..."¹⁹³ In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory.¹⁹⁴ However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it.

¹⁹³ *UNRIAA.*, vol. XII, p. 155 (1956), at p. 198.

¹⁹⁴ The matter is reserved by art. 39, Vienna Convention on Succession of States in Respect of Treaties, United Nations, *Treaty Series*, vol. 1946, p. 3.

(4) Outside the context of State succession, the *Diplomatic and Consular Staff* case¹⁹⁵ provides a further example of subsequent adoption by a State of particular conduct. There the Court drew a clear distinction between the legal situation immediately following the seizure of the United States embassy and its personnel by the militants, and that created by a decree of the Iranian State which expressly approved and maintained the situation. In the words of the Court:

“The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.”¹⁹⁶

In that case it made no difference whether the effect of the “approval” of the conduct of the militants was merely prospective, or whether it made the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel *ab initio*. The Islamic Republic of Iran had already been held responsible in relation to the earlier period on a different legal basis, viz., its failure to take sufficient action to prevent the seizure or to bring it to an immediate end.¹⁹⁷ In other cases no such prior responsibility will exist. Where the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect, which is what the Tribunal did in the *Lighthouses* arbitration.¹⁹⁸ This is consistent with the position established by article 10 for insurrectional movements and avoids gaps in the extent of responsibility for what is, in effect, the same continuing act.

¹⁹⁵ *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, p. 3

¹⁹⁶ *Ibid.*, at p. 35, para. 74.

¹⁹⁷ *Ibid.*, at pp. 31-33, paras. 63-68.

¹⁹⁸ *UNRIAA.*, vol. XII, p. 161 (1956), at pp. 197-8.

(5) As regards State practice, the capture and subsequent trial in Israel of Adolf Eichmann may provide an example of the subsequent adoption of private conduct by a State. On 10 May 1960, Eichmann was captured by a group of Israelis in Buenos Aires. He was held in captivity in Buenos Aires in a private home for some weeks before being taken by air to Israel. Argentina later charged the Israeli Government with complicity in Eichmann's capture, a charge neither admitted nor denied by the Israeli Foreign Minister (Ms. Meir), during the Security Council's discussion of the complaint. She referred to Eichmann's captors as a "volunteer group".¹⁹⁹ Security Council resolution 138 of 23 June 1960 implied a finding that the Israeli Government was at least aware of, and consented to, the successful plan to capture Eichmann in Argentina. It may be that Eichmann's captors were "in fact acting on the instructions of or under the direction or control of" Israel, in which case their conduct was more properly attributed to the State under article 8. But where there are doubts about whether certain conduct falls within article 8, these may be resolved by the subsequent adoption of the conduct in question by the State.

(6) The phrase "acknowledges and adopts the conduct in question as its own" is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement.²⁰⁰ The Court in the *Diplomatic and Consular Staff* case used phrases such as "approval", "endorsement", "the seal of official governmental approval" and "the decision to perpetuate [the situation]".²⁰¹ These were sufficient in the context of that case, but as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies States often take positions which amount to "approval" or "endorsement" of conduct in some general sense but do not involve any assumption of responsibility. The language of "adoption", on the other hand, carries with it the idea that the

¹⁹⁹ *S.C.O.R., Fifteenth Year*, 865th Mtg., 22 June 1960, p. 4.

²⁰⁰ The separate question of aid or assistance by a State to internationally wrongful conduct of another State is dealt with in article 16.

²⁰¹ *Diplomatic and Consular Staff, I.C.J. Reports 1980*, p. 3.

conduct is acknowledged by the State as, in effect, its own conduct. Indeed, provided the State's intention to accept responsibility for otherwise non-attributable conduct is clearly indicated, article 11 may cover cases in which a State has accepted responsibility for conduct of which it did not approve, had sought to prevent and deeply regretted. However such acceptance may be phrased in the particular case, the term "acknowledges and adopts" in article 11 makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own.

(7) The principle established by article 11 governs the question of attribution only. Where conduct has been acknowledged and adopted by a State, it will still be necessary to consider whether the conduct was internationally wrongful. For the purposes of article 11, the international obligations of the adopting State are the criterion for wrongfulness. The conduct may have been lawful so far as the original actor was concerned, or the actor may have been a private party whose conduct in the relevant respect was not regulated by international law. By the same token, a State adopting or acknowledging conduct which is lawful in terms of its own international obligations does not thereby assume responsibility for the unlawful acts of any other person or entity. Such an assumption of responsibility would have to go further and amount to an agreement to indemnify for the wrongful act of another.

(8) The phrase "if and to the extent that" is intended to convey a number of ideas. First, the conduct of, in particular, private persons, groups or entities is not attributable to the State unless under some other article of chapter II or unless it has been acknowledged and adopted by the State. Secondly, a State might acknowledge and adopt conduct only to a certain extent. In other words a State may elect to acknowledge and adopt only some of the conduct in question. Thirdly, the act of acknowledgment and adoption, whether it takes the form of words or conduct, must be clear and unequivocal.

(9) The conditions of acknowledgement and adoption are cumulative, as indicated by the word "and". The order of the two conditions indicates the normal sequence of events in cases in which article 11 is relied on. Acknowledgement and adoption of conduct by a State might be express (as for example in the *Diplomatic and Consular Staff* case), or it might be inferred from the conduct of the State in question.

Chapter III

Breach of an international obligation

(1) There is a breach of an international obligation when conduct attributed to a State as a subject of international law amounts to a failure by that State to comply with an international obligation incumbent upon it, or, to use the language of article 2 (b), when such conduct constitutes “a breach of an international obligation of the State”. This chapter develops the notion of a breach of an international obligation, to the extent that this is possible in general terms.

(2) It must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States.²⁰² In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc. There is no such thing as a breach of an international obligation in the abstract, and chapter III can only play an ancillary role in determining whether there has been such a breach, or the time at which it occurred, or its duration. Nonetheless a number of basic principles can be stated.

(3) The essence of an internationally wrongful act lies in the non-conformity of the State’s actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation. Such conduct gives rise to the new legal relations which are grouped under the common denomination of international responsibility. Chapter III therefore begins with a provision specifying in general terms when it may be considered that there is a breach of an international obligation (article 12). The basic concept having been defined, the other provisions of the chapter are devoted to specifying how this concept applies to various situations. In particular, the chapter deals with the question of the intertemporal law as it applies to State responsibility, i.e. the principle that a State is only responsible for a breach of an international obligation if the obligation is in force for the State at the time of the breach (article 13), with the equally important question of continuing breaches (article 14), and with the special problem of

²⁰² See the Introduction to these commentaries, paras. (2)-(4).

determining whether and when there has been a breach of an obligation which is directed not at single but at composite acts, i.e. where the essence of the breach lies in a series of acts defined in aggregate as wrongful (article 15).

(4) For the reason given in paragraph (2) above, it is neither possible nor desirable to deal in the framework of this Part with all the issues that can arise in determining whether there has been a breach of an international obligation. Questions of evidence and proof of such a breach fall entirely outside the scope of the Articles. Other questions concern rather the classification or typology of international obligations. These have only been included in the text where they can be seen to have distinct consequences within the framework of the secondary rules of State responsibility.²⁰³

Article 12

Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Commentary

(1) As stated in article 2, a breach by a State of an international obligation incumbent upon it gives rise to its international responsibility. It is first necessary to specify what is meant by a breach of an international obligation. This is the purpose of article 12, which defines in the most general terms what constitutes a breach of an international obligation by a State. In order to conclude that there is a breach of an international obligation in any specific case, it will be necessary to take account of the other provisions of chapter III which specify further conditions relating to the existence of a breach of an international obligation, as well as the provisions of chapter V dealing with circumstances which may preclude the wrongfulness of an act of a State. But in the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.

(2) In introducing the notion of a breach of an international obligation, it is necessary again to emphasize the autonomy of international law in accordance with the principle stated in article 3. In the terms of article 12, the breach of an international obligation consists in the

²⁰³ See, e.g., the classification of obligations of conduct and results, commentary to article 12, paras. (11) and (12).

disconformity between the conduct required of the State by that obligation and the conduct actually adopted by the State - i.e., between the requirements of international law and the facts of the matter. This can be expressed in different ways. For example the International Court has used such expressions as “incompatibility with the obligations” of a State,²⁰⁴ acts “contrary to” or “inconsistent with” a given rule,²⁰⁵ and “failure to comply with treaty obligations”.²⁰⁶ In the *ELSI* case, a Chamber of the Court asked the “question whether the requisition was in conformity with the requirements... of the FCN Treaty”.²⁰⁷ The expression “not in conformity with what is required of it by that obligation” is the most appropriate to indicate what constitutes the essence of a breach of an international obligation by a State. It allows for the possibility that a breach may exist even if the act of the State is only partly contrary to an international obligation incumbent upon it. In some cases precisely defined conduct is expected from the State concerned; in others the obligation only sets a minimum standard above which the State is free to act. Conduct proscribed by an international obligation may involve an act or an omission or a combination of acts and omissions; it may involve the passage of legislation, or specific administrative or other action in a given case, or even a threat of such action, whether or not the threat is carried out, or a final judicial decision. It may require the provision of facilities, or the taking of precautions or the enforcement of a prohibition. In every case, it is by comparing the conduct in fact engaged in by the State with the conduct legally prescribed by the international obligation that one can determine whether or not there is a breach of that obligation. The phrase “is not in conformity with” is flexible enough to cover the many different ways in which an obligation can be expressed, as well as the various forms which a breach may take.

²⁰⁴ *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, p. 3, at p. 29, para. 56.

²⁰⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14, at p. 64, para. 115, and at p. 98, para. 186, respectively.

²⁰⁶ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, at p. 46, para. 57.

²⁰⁷ *Elettronica Sicula S.p.A. (ELSI)*, I.C.J. Reports 1989, p. 15, at p. 50, para. 70.

(3) Article 12 states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation “regardless of its origin”. As this phrase indicates, the Articles are of general application. They apply to all international obligations of States, whatever their origin may be. International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order. States may assume international obligations by a unilateral act.²⁰⁸ An international obligation may arise from provisions stipulated in a treaty (a decision of an organ of an international organization competent in the matter, a judgment given between two States by the International Court of Justice or another tribunal, etc.). It is unnecessary to spell out these possibilities in article 12, since the responsibility of a State is engaged by the breach of an international obligation whatever the particular origin of the obligation concerned. The formula “regardless of its origin” refers to all possible sources of international obligations, that is to say, to all processes for creating legal obligations recognized by international law. The word “source” is sometimes used in this context, as in the preamble to the Charter of the United Nations which stresses the need to respect “the obligations arising from treaties and other sources of international law”. The word “origin” which has the same meaning, is not attended by the doubts and doctrinal debates the term “source” has provoked.

(4) According to article 12, the origin or provenance of an obligation does not, as such, alter the conclusion that responsibility will be entailed if it is breached by a State, nor does it, as such, affect the regime of State responsibility thereby arising. Obligations may arise for a State by a treaty and by a rule of customary international law or by a treaty and a unilateral act.²⁰⁹ Moreover these various grounds of obligation interact with each other, as practice clearly shows. Treaties, especially multilateral treaties, can contribute to the formation of general international

²⁰⁸ Thus France undertook by a unilateral act not to engage in further atmospheric nuclear testing: *Nuclear Tests (Australia v. France)*, *I.C.J. Reports 1974*, p. 253; *Nuclear Tests (New Zealand v. France)*, *I.C.J. Reports 1974*, p. 457. The extent of the obligation thereby undertaken was clarified in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, *I.C.J. Reports 1995*, p. 288.

²⁰⁹ The International Court has recognized “[t]he existence of identical rules in international treaty law and customary law” on a number of occasions: see *North Sea Continental Shelf*, *I.C.J. Reports 1969*, p. 3, at pp. 38-39, para. 63; *Military and Paramilitary Activities*, *I.C.J. Reports 1986*, p. 14, at p. 95, para. 177.

law; customary law may assist in the interpretation of treaties; an obligation contained in a treaty may be applicable to a State by reason of its unilateral act, and so on. Thus international courts and tribunals have treated responsibility as arising for a State by reason of any “violation of a duty imposed by an international juridical standard”.²¹⁰ In the *Rainbow Warrior* arbitration, the Tribunal said that “any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation”.²¹¹ In the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice referred to the relevant draft article provisionally adopted by the Commission in 1976 in support of the proposition that it is “well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect”.²¹²

(5) Thus there is no room in international law for a distinction, such as is drawn by some legal systems, between the regime of responsibility for breach of a treaty and for breach of some other rule, i.e. for responsibility arising *ex contractu* or *ex delicto*. In the *Rainbow Warrior* arbitration, the Tribunal affirmed that “in the international law field there is no distinction between contractual and tortious responsibility”.²¹³ As far as the origin of the obligation breached is concerned, there is a single general regime of State responsibility. Nor does any distinction exist between the “civil” and “criminal” responsibility as is the case in internal legal systems.

²¹⁰ *Dickson Car Wheel Co.*, *UNRIAA*, vol. IV, p. 669 (1931), at p. 678; cf. *Goldenberg*, *ibid.*, vol. II, p. 901 (1928), at pp. 908-909; *International Fisheries Co.*, *ibid.*, vol. IV, p. 691 (1931), at p. 701 (“some principle of international law”); *Armstrong Cork Co.*, *ibid.*, vol. XIV, p. 159 (1953), at p. 163 (“any rule whatsoever of international law”).

²¹¹ *Rainbow Warrior (New Zealand/France)*, *UNRIAA*, vol. XX, p. 217 (1990), at p. 251, para. 75. See also *Barcelona Traction, Light and Power Company, Limited, Second Phase*, *I.C.J. Reports 1970*, p. 3, at p. 46, para. 86 (“breach of an international obligation arising out of a treaty or a general rule of law”).

²¹² *I.C.J. Reports 1997*, p. 7, at p. 38, para. 47. The qualification “likely to be involved” may have been inserted because of possible circumstances precluding wrongfulness in that case.

²¹³ *UNRIAA*, vol. XX, p. 217 (1990), at p. 251, para. 75.

(6) State responsibility can arise from breaches of bilateral obligations or of obligations owed to some States or to the international community as a whole. It can involve relatively minor infringements as well as the most serious breaches of obligations under peremptory norms of general international law. Questions of the gravity of the breach and the peremptory character of the obligation breached can affect the consequences which arise for the responsible State and, in certain cases, for other States also. Certain distinctions between the consequences of certain breaches are accordingly drawn in Parts Two and Three of these Articles.²¹⁴ But the regime of State responsibility for breach of an international obligation under Part One is comprehensive in scope, general in character and flexible in its application: Part One is thus able to cover the spectrum of possible situations without any need for further distinctions between categories of obligation concerned or the category of the breach.

(7) Even fundamental principles of the international legal order are not based on any special source of law- or specific law-making procedure, in contrast with rules of constitutional character in internal legal systems. In accordance with article 53 of the Vienna Convention on the Law of Treaties, a peremptory norm of general international law is one which is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.²¹⁵ Article 53 recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as par excellence the holders of normative authority on behalf of the international community. Moreover, obligations imposed on States by peremptory norms necessarily affect the vital interests of the international community as a whole and may entail a stricter regime of responsibility than that applied to other internationally wrongful acts. But this is an issue belonging to the content of State responsibility.²¹⁶ So far at least as Part One of the Articles is concerned, there is a unitary regime of State responsibility which is general in character.

²¹⁴ See chapter Two, Part III and commentary; see also article 48 and commentary.

²¹⁵ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

²¹⁶ See articles 40-41 and commentaries.

(8) Rather similar considerations apply with respect to obligations arising under the Charter of the United Nations. Since the Charter is a treaty, the obligations it contains are, from the point of view of their origin, treaty obligations. The special importance of the Charter, as reflected in its Article 103,²¹⁷ derives from its express provisions as well as from the virtually universal membership of States in the United Nations.

(9) The general scope of the Articles extends not only to the conventional or other origin of the obligation breached but also to its subject matter. International awards and decisions specifying the conditions for the existence of an internationally wrongful act speak of the breach of an international obligation without placing any restriction on the subject-matter of the obligation breached.²¹⁸ Courts and tribunals have consistently affirmed the principle that there is no a priori limit to the subject matters on which States may assume international obligations. Thus the Permanent Court stated in its first judgment, in the *S.S. "Wimbledon"*, that "the right of entering into international engagements is an attribute of State sovereignty".²¹⁹ That proposition has often been endorsed.²²⁰

(10) In a similar perspective, it has sometimes been argued that an obligation dealing with a certain subject matter could only have been breached by conduct of the same description. That proposition formed the basis of an objection to the jurisdiction of the Court in the *Oil Platforms*

²¹⁷ According to which "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, the obligations under the present Charter shall prevail."

²¹⁸ See, e.g., *Factory at Chorzów, Jurisdiction*, 1927, *P.C.I.J.*, Series A, No. 9, p. 21; *Factory at Chorzów, Merits*, 1928, *P.C.I.J.*, Series A, No. 17, p. 29; *Reparation for Injuries Suffered in the Service of the United Nations*, *I.C.J. Reports* 1949, p. 174, at p. 184. In these decisions it is stated that "any breach of an international engagement" entails international responsibility. See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase*, *I.C.J. Reports* 1950, p. 221, at p. 228.

²¹⁹ *S.S. "Wimbledon"*, *Judgments*, 1923, *P.C.I.J.*, Series A, No. 1, p. 25.

²²⁰ See, e.g., *Nottebohm, Second Phase*, *I.C.J. Reports* 1955, p. 4, at pp. 20-21; *Right of Passage over Indian Territory, Merits*, *I.C.J. Reports* 1960, p. 6, at p. 33; *Military and Paramilitary Activities*, *I.C.J. Reports* 1986, p. 14, at p. 131, para. 259.

case.²²¹ It was argued that a treaty of friendship, commerce and navigation could not in principle have been breached by conduct involving the use of armed force. The Court responded in the following terms:

“The Treaty of 1955 imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not per se excluded from the reach of the Treaty of 1955.”²²²

Thus the breach by a State of an international obligation constitutes an internationally wrongful act, whatever the subject matter or content of the obligation breached, and whatever description may be given to the non-conforming conduct.

(11) Article 12 also states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation, “regardless of its ... character”. In practice, various classifications of international obligations have been adopted. For example a distinction is commonly drawn between obligations of conduct and obligations of result. That distinction may assist in ascertaining when a breach has occurred. But it is not exclusive,²²³ and it does not seem to bear specific or direct consequences as far as the present Articles are concerned. In the *Colozza* case,²²⁴ for example, the European Court of Human Rights was concerned with the trial in absentia of a person who, without actual notice of his trial,

²²¹ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, I.C.J. Reports 1996, p. 803.

²²² Ibid., at pp. 811-812, para. 21.

²²³ Cf., *Gabčíkovo-Nagymaros Project*, I.C.J. Reports 1997, p. 7, at p. 77, para. 135, where the Court referred to the parties having accepted “obligations of conduct, obligations of performance, and obligations of result”.

²²⁴ *Colozza and Rubinat v. Italy*, E.C.H.R., Series A, No. 89 (1985).

was sentenced to six years' imprisonment and was not allowed subsequently to contest his conviction. He claimed that he had not had a fair hearing, contrary to article 6 (1) of the European Convention. The Court noted that:

“The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of article 6 (1) in this field. The Court's task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved... For this to be so, the resources available under domestic law must be shown to be effective and a person ‘charged with a criminal offence’ ... must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure*.”²²⁵

The Court thus considered that article 6 (1) imposed an obligation of result.²²⁶ But, in order to decide whether there had been a breach of the Convention in the circumstances of the case, it did not simply compare the result required (the opportunity for a trial in the accused's presence) with the result practically achieved (the lack of that opportunity in the particular case). Rather it

²²⁵ Ibid., at pp. 15-16, para. 30, citing *De Cubber v. Belgium*, E.C.H.R., Series A, No. 86 (1984), p. 20, para. 35.

²²⁶ Cf. *Plattform ‘Ärzte für das Leben’ v. Austria*, in which the Court gave the following interpretation of article 11:

“While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used ... In this area the obligation they enter into under article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved”.

E.C.H.R., Series A, No. 139 (1988), p. 12, para. 34. In the *Colozza* case, the Court used similar language but concluded that the obligation was an obligation of result. Cf. C. Tomuschat, “What is a ‘Breach’ of the European Convention on Human Rights?”, in Lawson & de Blois (eds.), *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers* (Dordrecht, Nijhoff, 1994), p. 315, at p. 328.

examined what more Italy could have done to make the applicant's right "effective".²²⁷ The distinction between obligations of conduct and result was not determinative of the actual decision that there had been a breach of article 6 (1).²²⁸

(12) The question often arises whether an obligation is breached by the enactment of legislation by a State, in cases where the content of the legislation *prima facie* conflicts with what is required by the international obligation, or whether the legislation has to be implemented in the given case before the breach can be said to have occurred. Again, no general rule can be laid down applicable to all cases.²²⁹ Certain obligations may be breached by the mere passage of incompatible legislation.²³⁰ Where this is so, the passage of the legislation without more entails the international responsibility of the enacting State, the legislature itself being an organ of the State for the purposes of the attribution of responsibility.²³¹ In other circumstances, the

²²⁷ *E.C.H.R., Series A, No. 89* (1985), at para. 28.

²²⁸ See also *Islamic Republic of Iran v. United States of America, Cases A15 (IV) and A24*, (1998) 32 *Iran-U.S.C.T.R.*, 115.

²²⁹ Cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, *I.C.J. Reports 1988*, p. 12, at p. 30, para. 42.

²³⁰ A uniform law treaty will generally be construed as requiring immediate implementation, i.e. as embodying an obligation to make the provisions of the uniform law a part of the law of each State party: see, e.g., B. Conforti, "Obblighi di mezzi e obblighi di risultato nelle convenzioni di diritto uniforme", *Rivista di diritto internazionale privato e processuale*, vol. 24 (1988), p. 233.

²³¹ See article 4 and commentary. For illustrations see, e. g., the findings of the European Court of Human Rights in *Norris v. Ireland*, *E.C.H.R., Series A, No. 142* (1988), para. 31, citing *Klass v. Germany*, *E.C.H.R., Series A, No. 28* (1978), at para. 33; *Marckx v. Belgium*, *E.C.H.R., Series A, No. 31* (1979), at para. 27; *Johnston v. Ireland*, *E.C.H.R., Series A, No. 112* (1986), at para. 33; *Dudgeon v. United Kingdom*, *E.C.H.R., Series A, No. 45* (1981), para. 41; *Modinos v. Cyprus*, *E.C.H.R., Series A, No. 259* (1993), at para. 24. See also Advisory Opinion OC-14/94, *International responsibility for the promulgation and enforcement of laws in violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights)*, *Inter-Am.Ct.H.R., Series A, No. 14* (1994). The Inter-American Court also considered it possible to determine whether draft legislation was compatible with the provisions of human rights treaties: Advisory Opinion OC-3/83, *Restrictions to the Death Penalty (Arts. 4 (2) and 4 (4) of the American Convention on Human Rights)*, *Inter-Am.Ct.H.R. Series A, No. 3* (1983).

enactment of legislation may not in and of itself amount to a breach,²³² especially if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question. In such cases, whether there is a breach will depend on whether and how the legislation is given effect.²³³

Article 13

International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Commentary

(1) Article 13 states the basic principle that, for responsibility to exist, the breach must occur at a time when State is bound by the obligation. This is but the application in the field of State responsibility of the general principle of intertemporal law, as stated by Judge Huber in another context in the *Island of Palmas* case:

“A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.”²³⁴

Article 13 provides an important guarantee for States in terms of claims of responsibility. Its formulation (“does not constitute ... unless ...”) is in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility.

(2) International tribunals have applied the principle stated in article 13 in many cases. An instructive example is provided by the decision of Umpire Bates of the United States-Great Britain Mixed Commission concerning the conduct of British authorities

²³² As the International Court held in *LaGrand (Germany v. United States of America)*, *Merits*, judgment of 27 June 2001, paras. 90-91.

²³³ See, e.g., the report of the WTO Panel in *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, paras. 7.34-7.57.

²³⁴ *UNRIAA*, vol. II, p. 829 (1949), at p. 845. Generally on the intertemporal law see the Resolution of the Institute of International Law, *Annuaire de l'Institut de Droit International*, vol. 56 (1975), at pp. 536-540; for the debate, *ibid.*, pp. 339-374; for Sørensen's reports, *Annuaire de l'Institut de Droit International*, vol. 55 (1973) pp. 1-116. See further, W. Karl, “The Time Factor in the Law of State Responsibility”, in M. Spinedi and B. Simma (eds.), *United Nations Codification of State Responsibility* (New York, Oceana, 1987), p. 95.

who had seized American vessels engaged in the slave trade and freed slaves belonging to American nationals. The incidents referred to the Commission had taken place at different times and the umpire had to determine whether, at the time each incident took place, slavery was “contrary to the law of nations”. Earlier incidents, dating back to a time when the slave trade was considered lawful, amounted to a breach on the part of the British authorities of the international obligation to respect and protect the property of foreign nationals.²³⁵ The later incidents occurred when the slave trade had been “prohibited by all civilized nations” and did not involve the responsibility of Great Britain.²³⁶

(3) Similar principles were applied by Arbitrator Asser in deciding whether the seizure and confiscation by Russian authorities of United States vessels engaged in seal-hunting outside of Russia’s territorial waters should be considered internationally wrongful. In his award in *The “James Hamilton Lewis”*,²³⁷ he observed that the question had to be settled “according to the general principles of the law of nations and the spirit of the international agreements in force and binding upon the two High Parties at the time of the seizure of the vessel”.²³⁸ Since, under the principles in force at the time, Russia had no right to seize the American vessel, the seizure and confiscation of the vessel were unlawful acts for which Russia was required to pay compensation.²³⁹ The same principle has consistently been applied by the European

²³⁵ See *The “Enterprise”*, (1855) de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. I, p. 703; Moore, *International Arbitrations*, vol. IV, p. 4349, at p. 4373. See also *The “Hermosa”* and *The “Créole”* cases, (1855) de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. I, pp. 703, 704; Moore, *International Arbitrations*, vol. IV, pp. 4374, 4375.

²³⁶ See *The “Lawrence”*, (1855) de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. I, p. 740, at p. 741; Moore, *International Arbitrations*, vol. III, p. 2824. See also *The “Volusia”*, (1855) de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. I, p. 741.

²³⁷ *UNRIAA*, vol. IX, p. 66 (1902).

²³⁸ *Ibid.*, at p. 69.

²³⁹ *Ibid.* See also the case of *The “C.H. White”*, *UNRIAA*, vol. IX, p. 71 (1902), at p. 74. In these cases the arbitrator was required by the arbitration agreement itself to apply the law in force at the time the acts were performed. Nevertheless, the intention of the parties was clearly to confirm the application of the general principle in the context of the arbitration agreement, not to establish an exception. See also the *S.S. “Lisman”* case, *ibid.*, vol. III, p. 1767 (1937), at p. 1771.

Commission and Court of Human Rights to deny claims relating to periods during which the European Convention for the Protection of Human Rights and Fundamental Freedoms was not in force for the State concerned.²⁴⁰

(4) State practice also supports the principle. A requirement that arbitrators apply the rules of international law in force at the time when the alleged wrongful acts took place is a common stipulation in arbitration agreements,²⁴¹ and undoubtedly is made by way of explicit confirmation of a generally recognized principle. International law writers who have dealt with the question recognize that the wrongfulness of an act must be established on the basis of the obligations in force at the time when the act was performed.²⁴²

(5) State responsibility can extend to acts of the utmost seriousness, and the regime of responsibility in such cases will be correspondingly stringent. But even when a new peremptory norm of general international law comes into existence, as contemplated by article 64 of the Vienna Convention on the Law of Treaties, this does not entail any retrospective assumption of responsibility. Article 71 (2) provides that such a new peremptory norm “does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm”.

²⁴⁰ See, e.g., *X v. Germany* (Application 1151/61) (1961), *Recueil des décisions de la Commission européenne des droits de l'homme*, No. 7, p. 119 and many later decisions.

²⁴¹ See, e.g., the declarations exchanged between the United States and Russia for the submission to arbitration of certain disputes concerning the international responsibility of Russia for the seizure of American ships: *UNRIAA*, vol. IX, p. 57 (1900).

²⁴² See e.g. P. Tavernier, *Recherche sur l'application dans le temps des actes et des règles en droit international public* (Paris, L.G.D.J., 1970), pp. 119, 135, 292; D. Bindschedler-Robert, “De la rétroactivité en droit international public”, *Recueil d'études de droit international public en hommage à Paul Guggenheim* (Geneva, Faculté de droit, Institut universitaire de hautes études internationales, 1968), p. 184; M. Sørensen, “Le problème intertemporel dans l'application de la Convention européenne des droits de l'homme”, *Mélanges offerts à Polys Modinos* (Paris, Pedone, 1968), p. 304; T.O. Elias, “The Doctrine of Intertemporal Law”, *A.J.I.L.*, vol. 74 (1980), p. 285; R. Higgins, “Time and the Law”, *I.C.L.Q.*, vol. 46 (1997), p. 501.

(6) Accordingly it is appropriate to apply the intertemporal principle to all international obligations, and article 13 is general in its application. It is however without prejudice to the possibility that a State may agree to compensate for damage caused as a result of conduct which was not at the time a breach of any international obligation in force for that State. In fact cases of the retrospective assumption of responsibility are rare. The *lex specialis* principle (article 55) is sufficient to deal with any such cases where it may be agreed or decided that responsibility will be assumed retrospectively for conduct which was not a breach of an international obligation at the time it was committed.²⁴³

(7) In international law, the principle stated in article 13 is not only a necessary but also a sufficient basis for responsibility. In other words, once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law. Thus, as the International Court said in the *Northern Cameroons* case:

“... if during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust”.²⁴⁴

Similarly, in the *Rainbow Warrior* arbitration, the Arbitral Tribunal held that, although the relevant treaty obligation had terminated with the passage of time, France’s responsibility for its earlier breach remained.²⁴⁵

(8) Both aspects of the principle are implicit in the decision of the International Court in *Certain Phosphate Lands in Nauru*. Australia argued there that a State responsibility claim relating to the period of its joint administration of the Trust Territory for Nauru (1947-1968)

²⁴³ As to the retroactive effect of the acknowledgement and adoption of conduct by a State, see article 11 and commentary, esp. para. (4). Such acknowledgement and adoption would not, without more, give retroactive effect to the obligations of the adopting State.

²⁴⁴ *Northern Cameroons, Preliminary Objections, I.C.J. Reports 1963, P. 15, at p. 35.*

²⁴⁵ *Rainbow Warrior (New Zealand/France), UNRIIAA, vol. XX, p. 217 (1990), at pp. 265-266.*

could not be brought decades later, even if the claim had not been formally waived. The Court rejected the argument, applying a liberal standard of laches or unreasonable delay.²⁴⁶ But it went on to say that:

“it will be for the Court, in due time, to ensure that Nauru’s delay in seising it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law.”²⁴⁷

Evidently the Court intended to apply the law in force at the time the claim arose. Indeed that position was necessarily taken by Nauru itself, since its claim was based on a breach of the Trusteeship Agreement, which terminated at the date of its accession to independence in 1968. Its claim was that the responsibility of Australia, once engaged under the law in force at a given time, continued to exist even if the primary obligation had subsequently terminated.²⁴⁸

(9) The basic principle stated in article 13 is thus well-established. One possible qualification concerns the progressive interpretation of obligations, by a majority of the Court in the Namibia (*South West Africa*) advisory opinion.²⁴⁹ But the intertemporal principle does not entail that treaty provisions are to be interpreted as if frozen in time. The evolutionary interpretation of treaty provisions is permissible in certain cases²⁵⁰ but this has nothing to do with the principle that a State can only be held responsible for breach of an obligation which was in force for that State at the time of its conduct. Nor does the principle of the intertemporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant. For example, in dealing with the obligation to

²⁴⁶ *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections*, *I.C.J. Reports 1992*, p. 240, at pp. 253-255, paras. 31-36. See article 45 (b) and commentary.

²⁴⁷ *I.C.J. Reports 1992*, p. 240, at p. 255, para. 36.

²⁴⁸ The case was settled before the Court had the opportunity to consider the merits: *I.C.J. Reports 1993*, p. 322; for the Settlement Agreement of 10 August 1993, see United Nations, *Treaty Series*, vol. 1770, p. 379.

²⁴⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *I.C.J. Reports 1971*, p. 16, at pp. 31-32, para. 53.

²⁵⁰ See, e.g., the dictum of the European Court of Human Rights in *Tyrer v. United Kingdom*, *E.C.H.R., Series A, No. 26 (1978)*, at pp. 15-16.

ensure that persons accused are tried without undue delay, periods of detention prior to the entry into force of that obligation may be relevant as facts, even though no compensation could be awarded in respect of the period prior to the entry into force of the obligation.²⁵¹

Article 14

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Commentary

(1) The problem of identifying when a wrongful act begins and how long it continues is one which arises frequently²⁵² and has consequences in the field of State responsibility, including the important question of cessation of continuing wrongful acts dealt with in article 30. Although the existence and duration of a breach of an international obligation depends for the most part on the existence and content of the obligation and on the facts of the particular breach, certain basic

²⁵¹ See, e.g., *Zana v. Turkey*, *E.C.H.R. Reports*, 1997-VII, p. 2533; J. Pauwelyn, “The Concept of a ‘Continuing Violation’ of an International Obligation: Selected Problems”, *B.Y.I.L.*, vol. 66 (1995), p. 415, at pp. 443-445.

²⁵² See, e.g., *Mavrommatis Palestine Concessions*, 1924, *P.C.I.J.*, Series A, No. 2, p. 35; *Phosphates in Morocco*, *Preliminary Objections*, 1938, *P.C.I.J.*, Series A/B, No. 74, p. 10, at pp. 23-29; *Electricity Company of Sofia and Bulgaria*, 1939, *P.C.I.J.*, Series A/B, No. 77, p. 64, at pp. 80-82; *Right of Passage over Indian Territory*, *Merits*, *I.C.J. Reports* 1960, p. 6, at pp. 33-36. The issue has often been raised before the organs of the European Convention on Human Rights. See, e.g., the decision of the Commission in the *De Becker v. Belgium*, (1958-1959) 2 *E.C.H.R. Yearbook*, p. 214, at pp. 234, 244; and the Court’s judgments in *Ireland v. United Kingdom*, *E.C.H.R.*, Series A, No. 25 (1978), p. 64; *Papamichalopoulos and Others v. Greece*, *E.C.H.R.*, Series A, No. 260-B (1993), para. 40; *Agrotexim v. Greece*, *E.C.H.R.*, Series A, No. 330-A (1995), at p. 22, para. 58. See also E. Wyler, “Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite”, *R.G.D.I.P.*, vol. 95 (1991), p. 881.

concepts are established. These are introduced in article 14. Without seeking to be comprehensive in its treatment of the problem, article 14 deals with several related questions. In particular it develops the distinction between breaches not extending in time and continuing wrongful acts (see paragraphs (1) and (2) respectively), and it also deals with the application of that distinction to the important case of obligations of prevention. In each of these cases it takes into account the question of the continuance in force of the obligation breached.

(2) Internationally wrongful acts usually take some time to happen. The critical distinction for the purpose of article 14 is between a breach which is continuing and one which has already been completed. In accordance with paragraph 1, a completed act occurs “at the moment when the act is performed”, even though its effects or consequences may continue. The words “at the moment” are intended to provide a more precise description of the time-frame when a completed wrongful act is performed, without requiring that the act necessarily be completed in a single instant.

(3) In accordance with paragraph 2, a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period.²⁵³ Examples of continuing wrongful acts include the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent.

(4) Whether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case. For example, the Inter-American Court of Human Rights has interpreted forced or involuntary disappearance as a continuing wrongful act, one which continues for as long as the person concerned is unaccounted for.²⁵⁴ The question whether a wrongful taking of property is a completed or continuing act likewise depends to some extent on the content of the primary rule said to have been violated. Where an expropriation is carried out by legal process, with the consequence that title to the property

²⁵³ See above, article 13 and commentary, especially para. (2).

²⁵⁴ *Blake, Inter-Am.Ct.H.R., Series C, No. 36* (1998), para. 67.

concerned is transferred, the expropriation itself will then be a completed act. The position with a de facto, “creeping” or disguised occupation, however, may well be different.²⁵⁵

Exceptionally, a tribunal may be justified in refusing to recognize a law or decree at all, with the consequence that the resulting denial of status, ownership or possession may give rise to a continuing wrongful act.²⁵⁶

(5) Moreover, the distinction between completed and continuing acts is a relative one. A continuing wrongful act itself can cease: thus a hostage can be released, or the body of a disappeared person returned to the next of kin. In essence a continuing wrongful act is one which has been commenced but has not been completed at the relevant time. Where a continuing wrongful act has ceased, for example by the release of hostages or the withdrawal of forces from territory unlawfully occupied, the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue. In this respect it is covered by paragraph 1 of article 14.

(6) An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution, as required by Part Two of the Articles. The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.

(7) The notion of continuing wrongful acts is common to many national legal systems and owes its origins in international law to Triepel.²⁵⁷ It has been repeatedly referred to by the

²⁵⁵ *Papamichalopoulos v. Greece, E.C.H.R., Series A, No. 260-B (1993).*

²⁵⁶ *Loizidou v. Turkey, Merits, E.C.H.R. Reports 1996-VI, p. 2216.*

²⁵⁷ H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899), p. 289. The concept was subsequently taken up in various general studies on State responsibility as well as in works on the interpretation of the formula “situations or facts prior to a given date” used in some declarations of acceptance of the compulsory jurisdiction of the International Court of Justice.

International Court and by other international tribunals. For example in the *Diplomatic and Consular Staff* case, the Court referred to “successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963”.²⁵⁸

(8) The consequences of a continuing wrongful act will depend on the context, as well as on the duration of the obligation breached. For example, the *Rainbow Warrior* arbitration involved the failure of France to detain two agents on the French Pacific island of Hao for a period of three years, as required by an agreement between France and New Zealand. The Arbitral Tribunal referred with approval to the Commission’s draft articles (now amalgamated in article 14) and to the distinction between instantaneous and continuing wrongful acts, and said:

“Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach. And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features.”²⁵⁹

The Tribunal went on to draw further legal consequences from the distinction in terms of the duration of French obligations under the agreement.²⁶⁰

(9) The notion of continuing wrongful acts has also been applied by the European Court of Human Rights to establish its jurisdiction *ratione temporis* in a series of cases. The issue arises because the Court’s jurisdiction may be limited to events occurring after the respondent State became a party to the Convention or the relevant Protocol and accepted the right of individual petition. Thus in *Papamichalopoulos and Others v. Greece*, a seizure of property not involving formal expropriation occurred some eight years before Greece recognized the Court’s

²⁵⁸ *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, p. 3, at p. 37, para. 80. See also p. 37, para. 78.

²⁵⁹ *Rainbow Warrior (New Zealand/France)*, UNRIAA, vol. XX, p. 217 (1990), at p. 264, para. 101.

²⁶⁰ *Ibid.*, at pp. 265-266, paras 105-106. But see the dissenting opinion of Sir Kenneth Keith, *ibid.*, pp. 279-284.

competence. The Court held that there was a continuing breach of the right to peaceful enjoyment of property under article 1 of Protocol 1 to the Convention, which continued after the Protocol had come into force; it accordingly upheld its jurisdiction over the claim.²⁶¹

(10) In *Loizidou v. Turkey*,²⁶² similar reasoning was applied by the Court to the consequences of the Turkish invasion of Cyprus in 1974, as a result of which the applicant was denied access to her property in northern Cyprus. Turkey argued that under article 159 of the Constitution of the Turkish Republic of Northern Cyprus of 1985, the property in question had been expropriated, and this had occurred prior to Turkey's acceptance of the Court's jurisdiction in 1990. The Court held that, in accordance with international law and having regard to the relevant Security Council resolutions, it could not attribute legal effect to the 1985 Constitution so that the expropriation was not completed at that time and the property continued to belong to the Applicant. The conduct of the TRNC and of Turkish troops in denying the applicant access to her property continued after Turkey's acceptance of the Court's jurisdiction, and constituted a breach of article 1 of Protocol 1 after that time.²⁶³

(11) The Human Rights Committee has likewise endorsed the idea of continuing wrongful acts. For example, in *Lovelace v. Canada*, it held it had jurisdiction to examine the continuing effects for the applicant of the loss of her status as a registered member of an Indian group, although the loss had occurred at the time of her marriage in 1970 and Canada only accepted the Committee's jurisdiction in 1976. The Committee noted that it was ...

“not competent, as a rule, to examine allegations relating to events having taken place before the entry into force of the Covenant and the Optional Protocol ... In the case of Sandra Lovelace it follows that the Committee is not competent to express any view on the original cause of her loss of Indian status ... at the time of her marriage in 1970 ...

²⁶¹ *Papamichalopoulos and Others v. Greece*, E.C.H.R., Series A, No. 260-B (1993).

²⁶² *Loizidou v. Turkey*, Merits, E.C.H.R. Reports 1996-VI, p. 2216.

²⁶³ Ibid., at pp. 2230-2232, 2237-2238 paras. 41-47, 63-64. See however the dissenting judgment of Judge Bernhardt, ibid., 2242, para. 2 (with whom Judges Lopes Rocha, Jambrek, Pettiti, Baka and Gölcüklü in substance agreed). See also *Loizidou v. Turkey (Preliminary Objections)* E.C.H.R., Series A, No. 310 (1995), at pp. 33-34, paras. 102-105; *Cyprus v. Turkey* (Application No. 25781/94), E.C.H.R., judgment of 10 May 2001.

The Committee recognizes, however, that the situation may be different if the alleged violations, although relating to events occurring before 19 August 1976, continue, or have effects which themselves constitute violations, after that date.”²⁶⁴

It found that the continuing impact of Canadian legislation, in preventing Lovelace from exercising her rights as a member of a minority, was sufficient to constitute a breach of article 27 of the Covenant after that date. Here the notion of a continuing breach was relevant not only to the Committee’s jurisdiction but also to the application of article 27 as the most directly relevant provision of the Covenant to the facts in hand.

(12) Thus conduct which has commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can continue and give rise to a continuing wrongful act in the present. Moreover, this continuing character can have legal significance for various purposes, including State responsibility. For example, the obligation of cessation contained in article 30 applies to continuing wrongful acts.

(13) A question common to wrongful acts whether completed or continuing is when a breach of international law occurs, as distinct from being merely apprehended or imminent. As noted in the context of article 12, that question can only be answered by reference to the particular primary rule. Some rules specifically prohibit threats of conduct,²⁶⁵ incitement or attempt,²⁶⁶ in which case the threat, incitement or attempt is itself a wrongful act. On the other hand where the internationally wrongful act is the occurrence of some event - e.g. the diversion of an

²⁶⁴ *Lovelace v. Canada*, Communication No. R.6/24, *G.A.O.R.*, *Thirty-sixth Session, Supplement No. 40* (A/36/40) (1981), p. 166, at p. 172, paras. 10-11.

²⁶⁵ Notably, Article 2, paragraph 4, of the Charter of the United Nations prohibits the “threat or use of force against the territorial integrity or political independence of any State”. For the question of what constitutes a threat of force, see *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, p. 226, at pp. 246–247, paras. 47–48; cf. R. Sadurska, “Threats of Force”, *A.J.I.L.*, vol. 82 (1988), p. 239.

²⁶⁶ A particularly comprehensive formulation is that of article III of the Genocide Convention of 1948, which prohibits conspiracy, direct and public incitement, attempt and complicity in relation to genocide. See too: article 2 of the International Convention for the Suppression of Terrorist Bombings of 1997, A/RES/52/164, and article 2 of the International Convention for the Suppression of the Financing of Terrorism of 1999, A/RES/54/109.

international river - mere preparatory conduct is not necessarily wrongful.²⁶⁷ In the *Gabčíkovo-Nagymaros Project* case, the question was when the diversion scheme (“Variant C”) was put into effect. The Court held that the breach did not occur until the actual diversion of the Danube. It noted ...

“that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied. Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which ‘does not qualify as a wrongful act’...”²⁶⁸

Thus the Court distinguished between the actual commission of a wrongful act and conduct of a preparatory character. Preparatory conduct does not itself amount to a breach if it does not “predetermine the final decision to be taken”. Whether that is so in any given case will depend

²⁶⁷ In some legal systems, the notion of “anticipatory breach” is used to deal with the definitive refusal by a party to perform a contractual obligation, in advance of the time laid down for its performance. Confronted with an anticipatory breach, the party concerned is entitled to terminate the contract and sue for damages. See K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (3rd edn.) (trans. J.A. Weir) (Oxford, Oxford University Press, 1998), p. 508. Other systems achieve similar results without using this concept, e.g. by construing a refusal to perform in advance of the time for performance as a “positive breach of contract”: *ibid.*, p. 494 (German law). There appears to be no equivalent in international law, but article 60 (3) (a) of the Vienna Convention on the Law of Treaties defines a material breach as including “a repudiation ... not sanctioned by the present Convention”. Such a repudiation could occur in advance of the time for performance.

²⁶⁸ *Gabčíkovo-Nagymaros Project*, *I.C.J. Reports* 1997, p. 7, at p. 54, para. 79, citing the draft commentary to what is now article 30.

on the facts and on the content of the primary obligation. There will be questions of judgement and degree, which it is not possible to determine in advance by the use of any particular formula. The various possibilities are intended to be covered by the use of the term “occurs” in paragraphs 1 and 3 of article 14.

(14) Paragraph 3 of article 14 deals with the temporal dimensions of a particular category of breaches of international obligations, namely the breach of obligations to prevent the occurrence of a given event. Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur. The breach of an obligation of prevention may well be a continuing wrongful act, although, as for other continuing wrongful acts, the effect of article 13 is that the breach only continues if the State is bound by the obligation for the period during which the event continues and remains not in conformity with what is required by the obligation. For example, the obligation to prevent transboundary damage by air pollution, dealt with in the *Trail Smelter* arbitration,²⁶⁹ was breached for as long as the pollution continued to be emitted. Indeed, in such cases the breach may be progressively aggravated by the failure to suppress it. However, not all obligations directed to preventing an act from occurring will be of this kind. If the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), there will be no continuing wrongful act.²⁷⁰ If the obligation in question has ceased, any continuing conduct by definition ceases to be wrongful at that time.²⁷¹ Both qualifications are intended to be covered by the phrase in paragraph 3, “and remains not in conformity with that obligation”.

²⁶⁹ *UNRIAA*, vol. III, p. 1905 (1938, 1941).

²⁷⁰ An example might be an obligation by State A to prevent certain information from being published. The breach of such an obligation will not necessarily be of a continuing character, since it may be that once the information is published, the whole point of the obligation is defeated.

²⁷¹ Cf. the *Rainbow Warrior* arbitration, *UNRIAA*, vol. XX, p. 217(1990), at p. 266.

Article 15

Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Commentary

- (1) Within the basic framework established by the distinction between completed and continuing acts in article 14, article 15 deals with a further refinement, viz. the notion of a composite wrongful act. Composite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct.
- (2) Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words their focus is “a series of acts or omissions defined in aggregate as wrongful”. Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc. Some of the most serious wrongful acts in international law are defined in terms of their composite character. The importance of these obligations in international law justifies special treatment in article 15.²⁷²
- (3) Even though it has special features, the prohibition of genocide, formulated in identical terms in the 1948 Convention and in later instruments,²⁷³ may be taken as an illustration of a

²⁷² See further J. Salmon, “Le fait étatique complexe: une notion contestable”, *A.F.D.I.*, vol. XXVIII (1982), p. 709.

²⁷³ See, e.g., art. 4 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993 (originally published as an Annex to S/25704 and Add.1, approved by the Security Council by Resolution 827 (1993); amended 13 May 1998 by Resolution 1166 (1998) and 30 November 2000 by Resolution 1329 (2000)); art. 2 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for such Violations Committed in

“composite” obligation. It implies that the responsible entity (including a State) will have adopted a systematic policy or practice. According to article II (a) of the Convention, the prime case of genocide is “killing members of [a national, ethnical, racial or religious group]” with the intent to destroy that group as such, in whole or in part. Both limbs of the definition contain systematic elements. Genocide also has to be carried out with the relevant intention, aimed at physically eliminating the group “as such”. Genocide is not committed until there has been an accumulation of acts of killing, causing harm, etc., committed with the relevant intent, so as to satisfy the definition in article II. Once that threshold is crossed, the time of commission extends over the whole period during which any of the acts was committed, and any individual responsible for any of them with the relevant intent will have committed genocide.²⁷⁴

(4) It is necessary to distinguish composite obligations from simple obligations breached by a “composite” act. Composite acts may be more likely to give rise to continuing breaches, but simple acts can cause continuing breaches as well. The position is different, however, where the obligation itself is defined in terms of the cumulative character of the conduct, i.e. where the cumulative conduct constitutes the essence of the wrongful act. Thus apartheid is different in kind from individual acts of racial discrimination, and genocide is different in kind from individual acts even of ethnically or racially motivated killing.

(5) In *Ireland v. United Kingdom* Ireland complained of a practice of unlawful treatment of detainees in Northern Ireland which were said to amount to torture or inhuman or degrading treatment, and the case was held to be admissible on that basis. This had various procedural and remedial consequences. In particular, the exhaustion of local remedies rule did not have to be complied with in relation to each of the incidents cited as part of the practice. But the Court

the Territory of Neighbouring States, 8 November 1994, approved by the Security Council by Resolution 955 (1994); and art. 6 of the Rome Statute of the International Criminal Court, 17 July 1998 (A/CONF.183/9).

²⁷⁴ The intertemporal principle does not apply to the Genocide Convention, which according to article I of the Convention is declaratory. Thus the obligation to prosecute relates to genocide whenever committed. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, I.C.J. Reports 1996, p. 595, at p. 617, para. 34.

denied that there was any separate wrongful act of a systematic kind involved. It was simply that Ireland was entitled to complain of a practice made up by a series of breaches of article 7 of the Convention, and to call for its cessation. As the Court said:

“A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or system; *a practice does not of itself constitute a violation separate from such breaches* ... The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies. This rule, as embodied in article 26 of the Convention, applies to State applications ... in the same way as it does to ‘individual’ applications ... On the other hand and in principle, the rule does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Commission or the Court to give a decision on each of the cases put forward as proof or illustrations of that practice.”²⁷⁵

In the case of crimes against humanity, the composite act is a violation separate from the individual violations of human rights of which it is composed.

(6) A further distinction must be drawn between the necessary elements of a wrongful act and what might be required by way of evidence or proof that such an act has occurred. For example, an individual act of racial discrimination by a State is internationally wrongful,²⁷⁶ even though it may be necessary to adduce evidence of a series of acts by State officials (involving the same person or other persons similarly situated) in order to show that any one of those acts was discriminatory rather than actuated by legitimate grounds. In its essence such discrimination is not a composite act, but it may be necessary for the purposes of proving it to produce evidence of a practice amounting to such an act.

²⁷⁵ *E.C.H.R., Series A, No. 25* (1978), at p. 64, para. 159 (emphasis added); see also *ibid.*, at p. 63, para. 157. See also the United States counterclaim in *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Counter-Claim, I.C.J. Reports 1998*, p. 190, which likewise focuses on a general situation rather than specific instances.

²⁷⁶ See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, United Nations, *Treaty Series*, vol. 660, p. 195, art. 2; International Covenant on Civil and Political Rights, United Nations *Treaty Series*, vol. 999, p. 171, art. 26.

(7) A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful.

(8) Paragraph 1 of article 15 defines the time at which a composite act “occurs” as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series. Similar considerations apply as for completed and continuing wrongful acts in determining when a breach of international law exists; the matter is dependent upon the precise facts and the content of the primary obligation. The number of actions or omissions which must occur to constitute a breach of the obligation, is also determined by the formulation and purpose of the primary rule. The actions or omissions must be part of a series but the article does not require that the whole series of wrongful acts has to be committed in order to fall into the category of a composite wrongful act, provided a sufficient number of acts has occurred to constitute a breach. At the time when the act occurs which is sufficient to constitute the breach it may not be clear that further acts are to follow and that the series is not complete. Further, the fact that the series of actions or omissions was interrupted so that it was never completed will not necessarily prevent those actions or omissions which have occurred being classified as a composite wrongful act if, taken together, they are sufficient to constitute the breach.

(9) While composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation. For example the wrongful act of genocide is generally made up of a series of acts which are themselves internationally wrongful. Nor does it affect the temporal element in the commission of the acts: a series of acts or omissions may occur at the same time or sequentially, at different times.

(10) Paragraph 2 of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but

at that point the act should be regarded as having occurred over the whole period from the commission of the first action or omission. If this were not so, the effectiveness of the prohibition would thereby be undermined.

(11) The word “remain” in paragraph 2 is inserted to deal with the intertemporal principle set out in article 13. In accordance with that principle, the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the “first” of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. This need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent).

Chapter IV

Responsibility of a State in connection with the act of another State

(1) In accordance with the basic principles laid down in chapter I, each State is responsible for its own internationally wrongful conduct, i.e. for conduct attributable to it under chapter II which is in breach of an international obligation of that State in accordance with chapter III.²⁷⁷ The principle that State responsibility is specific to the State concerned underlies the present Articles as a whole. It will be referred to as the principle of independent responsibility. It is appropriate since each State has its own range of international obligations and its own correlative responsibilities.

(2) However, internationally wrongful conduct often results from the collaboration of several States rather than of one State acting alone.²⁷⁸ This may involve independent conduct by several States, each playing its own role in carrying out an internationally wrongful act. Or it may be

²⁷⁷ See especially article 2 and commentary.

²⁷⁸ See M.L. Padelletti, *Pluralità di Stati nel Fatto Illecito Internazionale* (Milan, Giuffrè, 1990); I. Brownlie, *System of the Law of Nations: State Responsibility (Part I)* (Oxford, Clarendon Press, 1983), pp. 189-192; J. Quigley, “Complicity in International Law: A New Direction in the Law of State Responsibility”, *B.Y.I.L.*, vol. 57 (1986), p. 77; J.E. Noyes & B.D. Smith, “State Responsibility and the Principle of Joint and Several Liability”, *Yale Journal of International Law*, vol. 13 (1988), p. 225; B. Graefrath, “Complicity in the Law of International Responsibility”, *Revue belge de droit international*, vol. 29 (1996), p. 370.

that a number of States act through a common organ to commit a wrongful act.²⁷⁹ Internationally wrongful conduct can also arise out of situations where a State acts on behalf of another State in carrying out the conduct in question.

(3) Various forms of collaborative conduct can coexist in the same case. For example, three States, Australia, New Zealand and the United Kingdom, together constituted the Administering Authority for the Trust Territory of Nauru. In *Certain Phosphate Lands in Nauru* proceedings were commenced against Australia alone in respect of acts performed on the “joint behalf” of the three States.²⁸⁰ The acts performed by Australia involved both “joint” conduct of several States and day-to-day administration of a territory by one State acting on behalf of other States as well as on its own behalf. By contrast, if the relevant organ of the acting State is merely “placed at the disposal” of the requesting State, in the sense provided for in article 6, only the requesting State is responsible for the act in question.

(4) In certain circumstances the wrongfulness of a State’s conduct may depend on the independent action of another State. A State may engage in conduct in a situation where another State is involved and the conduct of the other State may be relevant or even decisive in assessing whether the first State has breached its own international obligations. For example in the *Soering* case the European Court of Human Rights held that the proposed extradition of a person to a State not party to the European Convention where he was likely to suffer inhuman or degrading treatment or punishment involved a breach of article 3 of the Convention by the extraditing State.²⁸¹ Alternatively a State may be required by its own international obligations to prevent certain conduct by another State, or at least to prevent the harm that would flow from

²⁷⁹ In some cases the act in question may be committed by the organs of an international organization. This raises issues of the international responsibility of international organizations which fall outside the scope of the present articles. See article 57 and commentary.

²⁸⁰ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, *I.C.J. Reports 1992*, p. 240, at p. 258, para. 47; see also the separate opinion of Judge Shahabuddeen, *ibid.*, p. 284.

²⁸¹ *Soering v. United Kingdom*, *E.C.H.R., Series A, No. 161 (1989)*, at pp. 33-36, paras. 85-91. See also *Cruz Varas v. Sweden*, *E.C.H.R., Series A, No. 201 (1991)*, at p. 28, paras. 69-70; *Vilvarajah v. United Kingdom*, *E.C.H.R., Series A, No. 215 (1991)*, at p. 37, paras. 115-116.

such conduct. Thus the basis of responsibility in the *Corfu Channel* case²⁸² was Albania's failure to warn the United Kingdom of the presence of mines in Albanian waters which had been laid by a third State. Albania's responsibility in the circumstances was original and not derived from the wrongfulness of the conduct of any other State.

(5) In most cases of collaborative conduct by States, responsibility for the wrongful act will be determined according to the principle of independent responsibility referred to in paragraph (1) above. But there may be cases where conduct of the organ of one State, not acting as an organ or agent of another State, is nonetheless chargeable to the latter State, and this may be so even though the wrongfulness of the conduct lies, or at any rate primarily lies, in a breach of the international obligations of the former. Chapter IV of Part One defines these exceptional cases where it is appropriate that one State should assume responsibility for the internationally wrongful act of another.

(6) Three situations are covered in chapter IV. Article 16 deals with cases where one State provides aid or assistance to another State with a view to assisting in the commission of a wrongful act by the latter. Article 17 deals with cases where one State is responsible for the internationally wrongful act of another State because it has exercised powers of direction and control over the commission of an internationally wrongful act by the latter. Article 18 deals with the extreme case where one State deliberately coerces another into committing an act which is, or but for the coercion would be,²⁸³ an internationally wrongful act on the part of the coerced State. In all three cases, the act in question is still committed, voluntarily or otherwise, by organs or agents of the acting State, and is or, but for the coercion, would be a breach of that State's international obligations. The implication of the second State in that breach arises from the special circumstance of its willing assistance in, its direction and control over or its coercion of the acting State. But there are important differences between the three cases. Under article 16, the State primarily responsible is the acting State and the assisting State has a merely supporting role. Similarly under article 17, the acting State commits the internationally wrongful act, albeit

²⁸² *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 4, at p. 22.

²⁸³ If a State has been coerced, the wrongfulness of its act may be precluded by *force majeure*: see article 23 and commentary.

under the direction and control of another State. By contrast, in the case of coercion under article 18, the coercing State is the prime mover in respect of the conduct and the coerced State is merely its instrument.

(7) A feature of this chapter is that it specifies certain conduct as internationally wrongful. This may seem to blur the distinction maintained in the articles between the primary or substantive obligations of the State and its secondary obligations of responsibility.²⁸⁴ It is justified on the basis that responsibility under chapter IV is in a sense derivative.²⁸⁵ In national legal systems, rules dealing, for example, with conspiracy, complicity and inducing breach of contract may be classified as falling within the “general part” of the law of obligations. Moreover, the idea of the implication of one State in the conduct of another is analogous to problems of attribution, dealt with in chapter II.

(8) On the other hand, the situations covered in chapter IV have a special character. They are exceptions to the principle of independent responsibility and they only cover certain cases. In formulating these exceptional cases where one State is responsible for the internationally wrongful acts of another, it is necessary to bear in mind certain features of the international system. First, there is the possibility that the same conduct may be internationally wrongful so far as one State is concerned but not for another State having regard to its own international obligations. Rules of derived responsibility cannot be allowed to undermine the principle, stated in article 34 of the Vienna Convention on the Law of Treaties, that a treaty “does not create either obligations or rights for a third State without its consent”; similar issues arise with respect to unilateral obligations and even, in certain cases, rules of general international law. Hence it is only in the extreme case of coercion that a State may become responsible under this chapter for conduct which would not have been internationally wrongful if performed by that State. Secondly, States engage in a wide variety of activities through a multiplicity of organs and agencies. For example, a State providing financial or other aid to another State should not be required to assume the risk that the latter will divert the aid for purposes which may be

²⁸⁴ See above, Introduction to the articles, paras. (1), (2), (4) for an explanation of the distinction.

²⁸⁵ Cf. the term “responsabilité dérivée” used by Arbitrator Huber in *British Claims in the Spanish Zone of Morocco*, UNRIAA, vol. II, p. 615 (1924), at p. 648.

internationally unlawful. Thus it is necessary to establish a close connection between the action of the assisting, directing or coercing State on the one hand and that of the State committing the internationally wrongful act on the other. Thus the articles in this Part require that the former State should be aware of the circumstances of the internationally wrongful act in question, and establish a specific causal link between that act and the conduct of the assisting, directing or coercing State. This is done without prejudice to the general question of “wrongful intent” in matters of State responsibility, on which the articles are neutral.²⁸⁶

(9) Similar considerations dictate the exclusion of certain situations of “derived responsibility” from chapter IV. One of these is incitement. The incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support or does not involve direction and control on the part of the inciting State.²⁸⁷ However, there can be specific treaty obligations prohibiting incitement under certain circumstances.²⁸⁸ Another concerns the issue which is described in some systems of internal law as being an “accessory after the fact”. It seems that there is no general obligation on the part of third States to cooperate in suppressing internationally wrongful conduct of another State which may already have occurred. Again it is a matter for specific treaty obligations to establish any such obligation of suppression after the event. There are, however, two important qualifications here. First, in some circumstances assistance given by one State to another after the latter has committed an internationally wrongful act may amount to the adoption of that act by the former State. In such cases responsibility for that act potentially arises pursuant to article 11. Secondly, special obligations of cooperation in putting an end to an

²⁸⁶ See above, commentary to article 2, paras. (3) and (10).

²⁸⁷ See the statement of the United States-French Commissioners relating to the *French Indemnity of 1831*, in Moore, *International arbitrations*, vol. V, p. 4399, at pp. 4473-4476. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, *I.C.J. Reports 1986*, p. 14, at p. 129, para. 255, and the dissenting opinion of Judge Schwebel, *ibid.*, p. 379, para. 259.

²⁸⁸ Cf., e.g., art. III (c) of the Convention on the Prevention and Punishment of the Crime of Genocide, United Nations, *Treaty Series*, vol. 78, p. 277; art. 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, vol. 660, p. 195.

unlawful situation arise in the case of serious breaches of obligations under peremptory norms of general international law. By definition, in such cases States will have agreed that no derogation from such obligations is to be permitted and, faced with a serious breach of such an obligation, certain obligations of cooperation arise. These are dealt with in article 41.

Article 16

Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Commentary

(1) Article 16 deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter. Such situations arise where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question. Other examples include providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country. The State primarily responsible in each case is the acting State, and the assisting State has only a supporting role. Hence the use of the term “by the latter” in the chapeau to article 16, which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act. Under article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State. In such a case, the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.

(2) Various specific substantive rules exist, prohibiting one State from providing assistance in the commission of certain wrongful acts by other States or even requiring third States to prevent or repress such acts.²⁸⁹ Such provisions do not rely on any general principle of derived responsibility, nor do they deny the existence of such a principle, and it would be wrong to infer from them the non-existence of any general rule. As to treaty provisions such as Article 2, paragraph (5) of the United Nations Charter, again these have a specific rationale which goes well beyond the scope and purpose of article 16.

(3) Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.

(4) The requirement that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful is reflected by the phrase “knowledge of the circumstances of the internationally wrongful act”. A State providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act. If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.

(5) The second requirement is that the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.

²⁸⁹ See, e.g., G.A. Res. 2625 (XXV) of 24 October 1970, first principle, para. 9; G.A. Res. 3314 (XXIX), annex, para. 3 (f).

(6) The third condition limits article 16 to aid or assistance in the breach of obligations by which the aiding or assisting State is itself bound. An aiding or assisting State may not deliberately procure the breach by another State of an obligation by which both States are bound; a State cannot do by another what it cannot do by itself. On the other hand, a State is not bound by obligations of another State vis-à-vis third States. This basic principle is also embodied in articles 34 and 35 of the Vienna Convention on the Law of Treaties.²⁹⁰ Correspondingly, a State is free to act for itself in a way which is inconsistent with obligations of another State vis-à-vis third States. Any question of responsibility in such cases will be a matter for the State to whom assistance is provided vis-à-vis the injured State. Thus it is a necessary requirement for the responsibility of an assisting State that the conduct in question, if attributable to the assisting State, would have constituted a breach of its own international obligations.

(7) State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting State. For example, in 1984 Iran protested against the supply of financial and military aid to Iraq by the United Kingdom, which allegedly included chemical weapons used in attacks against Iranian troops, on the ground that the assistance was facilitating acts of aggression by Iraq.²⁹¹ The British Government denied both the allegation that it had chemical weapons and that it had supplied them to Iraq.²⁹² In 1998, a similar allegation surfaced that Sudan had assisted Iraq to manufacture chemical weapons by allowing Sudanese installations to be used by Iraqi technicians for steps in the production of nerve gas. The allegation was denied by Iraq's representative to the United Nations.²⁹³

(8) The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State. An example is provided by a statement made by the Government of the Federal Republic

²⁹⁰ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, 1155, p. 331.

²⁹¹ See *New York Times*, 6 March 1984, p. A1, col. 1.

²⁹² See *New York Times*, 5 March 1984, p. A3, col. 1.

²⁹³ See *New York Times*, 26 August 1998, p. A8, col. 1.

of Germany in response to an allegation that Germany had participated in an armed attack by allowing United States military aircraft to use airfields in its territory in connection with the United States intervention in Lebanon. While denying that the measures taken by the United States and the United Kingdom in the Near East constituted intervention, the Federal Republic of Germany nevertheless seems to have accepted that the act of a State in placing its own territory at the disposal of another State in order to facilitate the commission of an unlawful use of force by that other State was itself an internationally wrongful act.²⁹⁴ Another example arises from the Tripoli bombing incident in April 1986. Libya charged the United Kingdom with responsibility for the event, based on the fact that the United Kingdom had allowed several of its air bases to be used for the launching of American fighter planes to attack Libyan targets.²⁹⁵ Libya asserted that the United Kingdom “would be held partly responsible” for having “supported and contributed in a direct way” to the raid.²⁹⁶ The United Kingdom denied responsibility on the basis that the raid by the United States was lawful as an act of self-defence against Libyan terrorist attacks on American targets.²⁹⁷ A proposed Security Council resolution concerning the attack was vetoed, but the United Nations General Assembly issued a resolution condemning the “military attack” as “a violation of the Charter of the United Nations and of international law”, and calling upon all States “to refrain from extending any assistance or facilities for perpetrating acts of aggression against the Libyan Arab Jamahiriya”.²⁹⁸

(9) The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it assists another State to circumvent sanctions

²⁹⁴ For the text of the note see *Z.a.ö.R.V.*, vol. 20 (1960), pp. 663-664.

²⁹⁵ See United States of America, *Department of State Bulletin*, No. 2111, June 1986, p. 8.

²⁹⁶ See the statement of Ambassador Hamed Houdeiry, Libyan People’s Bureau, Paris, *The Times*, 16 April 1986, p. 6, col. 7.

²⁹⁷ Statement of Mrs. Margaret Thatcher, Prime Minister, *House of Commons Debates*, 6th series, vol. 95, col. 737 (15 April 1986), reprinted in *B.Y.I.L.*, vol. 57 (1986), p. 638.

²⁹⁸ See G.A. Res. 41/38 of 20 November 1986, paras. 1, 3.

imposed by the United Nations Security Council²⁹⁹ or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the United Nations General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.³⁰⁰

Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.

(10) In accordance with article 16, the assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible, as such, for the act of the assisted State. In some cases this may be a distinction without a difference: where the assistance is a necessary element in the wrongful act in absence of which it could not have occurred, the injury suffered can be concurrently attributed to the assisting and the acting State.³⁰¹ In other cases, however, the difference may be very material: the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered. By assisting another State to commit an internationally wrongful act, a State should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which, in accordance with the principles stated in Part Two of the articles, flow from its own conduct.

(11) Article 16 does not address the question of the admissibility of judicial proceedings to establish the responsibility of the aiding or assisting State in the absence of or without the consent of the aided or assisted State. The International Court has repeatedly affirmed that it cannot decide on the international responsibility of a State if, in order to do so, “it would have to

²⁹⁹ See, e.g., Report by President Clinton, *A.J.I.L.*, vol. 91 (1997), p. 709.

³⁰⁰ *Report of the Economic and Social Council, Report of the Third Committee of the General Assembly*, draft resolution XVII, 14 December 1982, A/37/745, p. 50.

³⁰¹ For the question of concurrent responsibility of several States for the same injury see article 47 and commentary.

rule, as a prerequisite, on the lawfulness³⁰² of the conduct of another State, in the latter's absence and without its consent. This is the so-called *Monetary Gold* principle.³⁰³ That principle may well apply to cases under article 16, since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act. The wrongfulness of the aid or assistance given by the former is dependent, *inter alia*, on the wrongfulness of the conduct of the latter. This may present practical difficulties in some cases in establishing the responsibility of the aiding or assisting State, but it does not vitiate the purpose of article 16. The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings, not with questions of responsibility as such. Moreover that principle is not all-embracing, and the *Monetary Gold* principle may not be a barrier to judicial proceedings in every case. In any event, wrongful assistance given to another State has frequently led to diplomatic protests. States are entitled to assert complicity in the wrongful conduct of another State even though no international court may have jurisdiction to rule on the charge, at all or in the absence of the other State.

Article 17

Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Commentary

(1) Article 17 deals with a second case of derived responsibility, the exercise of direction and control by one State over the commission of an internationally wrongful act by another. Under article 16 a State providing aid or assistance with a view to the commission of an internationally

³⁰² *East Timor (Portugal v. Australia)*, I.C.J. Reports 1995, p. 90, at p. 105, para. 35.

³⁰³ *Monetary Gold Removed from Rome in 1943*, I.C.J. Reports 1954, p. 19, at p. 32; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, I.C.J. Reports 1992, p. 240, at p. 261, para. 55.

wrongful act incurs international responsibility only to the extent of the aid or assistance given. By contrast, a State which directs and controls another in the commission of an internationally wrongful act is responsible for the act itself, since it controlled and directed the act in its entirety.

(2) Some examples of international responsibility flowing from the exercise of direction and control over the commission of a wrongful act by another State are now largely of historical significance. International dependency relationships such as “suzerainty” or “protectorate” warranted treating the dominant State as internationally responsible for conduct formally attributable to the dependent State. For example, in *Rights of Nationals of the United States in Morocco*,³⁰⁴ France commenced proceedings under the Optional Clause in respect of a dispute concerning the rights of United States nationals in Morocco under French protectorate. The United States objected that any eventual judgment might not be considered as binding upon Morocco, which was not a party to the proceedings. France confirmed that it was acting both in its own name and as the protecting power over Morocco, with the result that the Court’s judgment would be binding both on France and on Morocco,³⁰⁵ and the case proceeded on that basis.³⁰⁶ The Court’s judgment concerned questions of the responsibility of France in respect of the conduct of Morocco which were raised both by the Application and by the United States counter-claim.

(3) With the developments in international relations since 1945, and in particular the process of decolonization, older dependency relationships have been terminated. Such links do not involve any legal right to direction or control on the part of the representing State. In cases of representation, the represented entity remains responsible for its own international obligations, even though diplomatic communications may be channelled through another State. The representing State in such cases does not, merely because it is the channel through which

³⁰⁴ *Rights of Nationals of the United States of America in Morocco*, I.C.J. Reports 1952, p. 176.

³⁰⁵ See I.C.J. Pleadings, *Rights of Nationals of the United States of America in Morocco*, vol. I, p. 235; *ibid.*, vol. II, pp. 431-433; the United States thereupon withdrew its preliminary objection: *ibid.*, p. 434.

³⁰⁶ See *Rights of Nationals of the United States of America in Morocco*, I.C.J. Reports 1952, p. 176, at p. 179.

communications pass, assume any responsibility for their content. This is not in contradiction to the *British Claims in the Spanish Zone of Morocco* arbitration, which affirmed that “the responsibility of the protecting State ... proceeds from the fact that the protecting State alone represents the protected territory in its international relations,”³⁰⁷ and that the protecting State is answerable “in place of the protected State.”³⁰⁸ The principal concern in the arbitration was to ensure that, in the case of a protectorate which put an end to direct international relations by the protected State, international responsibility for wrongful acts committed by the protected State was not erased to the detriment of third States injured by the wrongful conduct. The acceptance by the protecting State of the obligation to answer in place of the protected State was viewed as an appropriate means of avoiding that danger.³⁰⁹ The justification for such an acceptance was not based on the relationship of “representation” as such but on the fact that the protecting State was in virtually total control over the protected State. It was not merely acting as a channel of communication.

(4) Other relationships of dependency, such as dependent territories fall entirely outside the scope of article 17, which is concerned only with the responsibility of one State for the conduct of another State. In most relationships of dependency between one territory and another, the dependent territory, even if it may possess some international personality, is not a State. Even in cases where a component unit of a federal State enters into treaties or other international legal relations in its own right, and not by delegation from the federal State, the component unit is not itself a State in international law. So far as State responsibility is concerned, the position of federal States is no different from that of any other States: the normal principles specified in articles 4 to 9 of the draft articles apply, and the federal State is internationally responsible for the conduct of its component units even though that conduct falls within their own local control under the federal constitution.³¹⁰

³⁰⁷ *British Claims in the Spanish Zone of Morocco*, UNRIIAA, vol. II, p. 615 (1925), at p. 649 (translation).

³⁰⁸ *Ibid.*, at p. 648.

³⁰⁹ *Ibid.*

³¹⁰ See, e.g., *LaGrand (Germany v. United States of America)*, *Provisional Measures*, I.C.J. Reports 1999, p. 9, at p. 16, para. 28.

(5) Nonetheless, instances exist or can be envisaged where one State exercises the power to direct and control the activities of another State, whether by treaty or as a result of a military occupation or for some other reason. For example, during the belligerent occupation of Italy by Germany in the Second World War, it was generally acknowledged that the Italian police in Rome operated under the control of the occupying Power. Thus the protest by the Holy See in respect of wrongful acts committed by Italian police who forcibly entered the Basilica of St. Paul in Rome in February 1944 asserted the responsibility of the German authorities.³¹¹ In such cases the occupying State is responsible for acts of the occupied State which it directs and controls.

(6) Article 17 is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State. International tribunals have consistently refused to infer responsibility on the part of a dominant State merely because the latter may have the power to interfere in matters of administration internal to a dependent State, if that power is not exercised in the particular case. In the *Robert E. Brown* case,³¹² for example, the Arbitral Tribunal held that the authority of Great Britain, as suzerain over the South African Republic prior to the Boer War, “fell far short of what would be required to make her responsible for the wrong inflicted upon Brown.”³¹³ It went on to deny that Great Britain possessed power to interfere in matters of internal administration and continued that there was no evidence “that Great Britain ever did undertake to interfere in this way.”³¹⁴ Accordingly the relation of suzerainty “did not operate to render Great Britain liable for the acts complained of.”³¹⁵ In the *Heirs of the Duc de Guise* case,³¹⁶ the Franco-Italian Conciliation Commission held that Italy was responsible for a requisition carried out by Italy in Sicily at a

³¹¹ See R. Ago, “L’occupazione bellica di Roma e il Trattato lateranense”, *Comunicazioni e Studi* (Milan, Giuffrè, 1946), vol. II, pp. 167-168.

³¹² *Brown (United States) v. Great Britain*, *UNRIAA*, vol. VI, p. 120 (1923).

³¹³ *Ibid.*, at p. 130.

³¹⁴ *Ibid.*, at p. 131.

³¹⁵ *Ibid.*

³¹⁶ *Heirs of the Duc de Guise*, *UNRIAA*, vol. XIII, p. 150 (1951).

time when it was under Allied occupation. Its decision was not based on the absence of Allied power to requisition the property, or to stop Italy from doing so. Rather the majority pointed to the absence in fact of any “intermeddling on the part of the Commander of the Occupation forces or any Allied authority calling for the requisition decrees”.³¹⁷ The mere fact that a State may have power to exercise direction and control over another State in some field is not a sufficient basis for attributing to it any wrongful acts of the latter State in that field.³¹⁸

(7) In the formulation of article 17, the term “controls” refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word “directs” does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind. Both direction and control must be exercised over the wrongful conduct in order for a dominant State to incur responsibility. The choice of the expression, common in English, “*direction and control*”, raised some problems in other languages, owing in particular to the ambiguity of the term “*direction*” which may imply, as is the case in French, complete power, whereas it does not have this implication in English.

(8) Two further conditions attach to responsibility under article 17. First, the dominant State is only responsible if it has knowledge of the circumstances making the conduct of the dependent State wrongful. Secondly, it has to be shown that the completed act would have been wrongful had it been committed by the directing and controlling State itself. This condition is significant in the context of bilateral obligations, which are not opposable to the directing State. In cases of multilateral obligations and especially of obligations to the international community, it is of much less significance. The essential principle is that a State should not be able to do through another what it could not do itself.

³¹⁷ Ibid., p. 161. See also, in another context, *Drodz & Janousek v. France & Spain*, E.C.H.R., Series A, No. 240 (1992); see also *Iribarne Pérez v. France*, E.C.H.R., Series A, No. 325-C (1995), at pp. 62-63, paras. 29-31.

³¹⁸ It may be that the fact of the dependence of one State upon another is relevant in terms of the burden of proof, since the mere existence of a formal State apparatus does not exclude the possibility that control was exercised in fact by an occupying Power. Cf. *Restitution of Household Effects Belonging to Jews Deported from Hungary (Germany)* (Kammergericht, Berlin) (1965), I.L.R., vol. 44, p. 301, at pp. 340-342.

(9) As to the responsibility of the directed and controlled State, the mere fact that it was directed to carry out an internationally wrongful act does not constitute an excuse under chapter V of Part One. If the conduct in question would involve a breach of its international obligations, it is incumbent upon it to decline to comply with the direction. The defence of “superior orders” does not exist for States in international law. This is not to say that the wrongfulness of the directed and controlled State’s conduct may not be precluded under chapter V, but this will only be so if it can show the existence of a circumstance precluding wrongfulness, e.g. *force majeure*. In such a case it is to the directing State alone that the injured State must look. But as between States, genuine cases of *force majeure* or coercion are exceptional. Conversely it is no excuse for the directing State to show that the directed State was a willing or even enthusiastic participant in the internationally wrongful conduct, if in truth the conditions laid down in article 17 are met.

Article 18

Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(b) The coercing State does so with knowledge of the circumstances of the act.

Commentary

(1) The third case of derived responsibility dealt with by chapter IV is that of coercion of one State by another. Article 18 is concerned with the specific problem of coercion deliberately exercised in order to procure the breach of one State’s obligation to a third State. In such cases the responsibility of the coercing State with respect to the third State derives not from its act of coercion, but rather from the wrongful conduct resulting from the action of the coerced State. Responsibility for the coercion itself is that of the coercing State vis-à-vis the coerced State, whereas responsibility under article 18 is the responsibility of the coercing State vis-à-vis a victim of the coerced act, in particular a third State which is injured as a result.

(2) Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State. It is not sufficient that compliance with the obligation is made more difficult or onerous, or that the acting State is assisted or directed in its conduct: such questions are covered by the preceding articles. Moreover, the coercing State must coerce the very act which is internationally wrongful. It is not enough that the consequences of the coerced act merely make it more difficult for the coerced State to comply with the obligation.

(3) Though coercion for the purpose of article 18 is narrowly defined, it is not limited to unlawful coercion.³¹⁹ As a practical matter, most cases of coercion meeting the requirements of the article will be unlawful, e.g., because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention, i.e. coercive interference, in the affairs of another State. Such is also the case with countermeasures. They may have a coercive character, but as is made clear in article 49, their function is to induce a wrongdoing State to comply with obligations of cessation and reparation towards the State taking the countermeasures, not to coerce that State to violate obligations to third States.³²⁰ However, coercion could possibly take other forms, e.g. serious economic pressure, provided that it is such as to deprive the coerced State of any possibility of conforming with the obligation breached.

(4) The equation of coercion with *force majeure* means that in most cases where article 18 is applicable, the responsibility of the coerced State will be precluded vis-à-vis the injured third State. This is reflected in the phrase “but for the coercion” in subparagraph (a) of article 18. Coercion amounting to *force majeure* may be the reason why the wrongfulness of an act is precluded vis-à-vis the coerced State. Therefore the act is not described as an internationally wrongful act in the opening clause of the article, as is done in articles 16 and 17, where no comparable circumstance would preclude the wrongfulness of the act of the assisted or controlled State. But there is no reason why the wrongfulness of that act should be precluded vis-à-vis the coercing State. On the contrary, if the coercing State cannot be held responsible for the act in question, the injured State may have no redress at all.

³¹⁹ P. Reuter, *Introduction au droit des traités* (3rd edn.) (Paris, Presse Universitaire de France, 1995), pp. 159-161, paras. 271-274.

³²⁰ See article 49 (2) and commentary.

(5) It is a further requirement for responsibility under article 18 that the coercing State must be aware of the circumstances which would, but for the coercion, have entailed the wrongfulness of the coerced State's conduct. The reference to "circumstances" in subparagraph (b) is understood as reference to the factual situation rather than to the coercing State's judgement of the legality of the act. This point is clarified by the phrase "circumstances of the act". Hence, while ignorance of the law is no excuse, ignorance of the facts is material in determining the responsibility of the coercing State.

(6) A State which sets out to procure by coercion a breach of another State's obligations to a third State will be held responsible to the third State for the consequences, regardless of whether the coercing State is also bound by the obligation in question. Otherwise, the injured State would potentially be deprived of any redress, because the acting State may be able to rely on *force majeure* as a circumstance precluding wrongfulness. Article 18 thus differs from articles 16 and 17 in that it does not allow for an exemption from responsibility for the act of the coerced State in circumstances where the coercing State is not itself bound by the obligation in question.

(7) State practice lends support to the principle that a State bears responsibility for the internationally wrongful conduct of another State which it coerces. In the *Romano-Americana* case, the claim of the United States Government in respect of the destruction of certain oil storage and other facilities owned by an American company on the orders of the Romanian Government during the First World War was originally addressed to the British Government. At the time the facilities were destroyed, Romania was at war with Germany, which was preparing to invade the country, and the United States claimed that the Romanian authorities had been "compelled" by Great Britain to take the measures in question. In support of its claim, the United States Government argued that the circumstances of the case revealed "a situation where a strong belligerent for a purpose primarily its own arising from its defensive requirements at sea, compelled a weaker Ally to acquiesce in an operation which it carried out in the territory of that Ally."³²¹ The British Government denied responsibility, asserting that its influence over the

³²¹ Note from the United States Embassy in London, 16 February 1925, in Hackworth, *Digest*, vol. V, p. 702.

conduct of the Romanian authorities “did not in any way go beyond the limits of persuasion and good counsel as between governments associated in a common cause.”³²² The point of disagreement between the governments of the United States and of Great Britain was not as to the responsibility of a State for the conduct of another State which it has coerced, but rather the existence of “compulsion” in the particular circumstances of the case.³²³

Article 19

Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

Commentary

- (1) Article 19 serves three purposes. First, it preserves the responsibility of the State which has committed the internationally wrongful act, albeit with the aid or assistance, under the direction and control or subject to the coercion of another State. It recognizes that the attribution of international responsibility to an assisting, directing or coercing State does not preclude the responsibility of the assisted, directed or coerced State.
- (2) Second, the article makes clear that the provisions of chapter IV are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State under any rule of international law defining particular conduct as wrongful. The phrase “under other provisions of these articles” is a reference, *inter alia*, to article 23 (*force majeure*), which might affect the question of responsibility. The phrase also draws attention to the fact that other provisions of the draft articles may be relevant to the State committing the act in question, and that chapter IV in no way precludes the issue of its responsibility in that regard.
- (3) Third, article 19 preserves the responsibility “of any other State” to whom the internationally wrongful conduct might also be attributable under other provisions of the articles.

³²² Note from the British Foreign Office dated 5 July 1928, *ibid.*, p. 704.

³²³ For a different example involving the coercion of a breach of contract in circumstances amounting to a denial of justice see C.L. Bouvé, “Russia’s liability in tort for Persia’s breach of contract”, *A.J.I.L.*, vol. 6 (1912), p. 389.

(4) Thus article 19 is intended to avoid any contrary inference in respect of responsibility which may arise from primary rules, precluding certain forms of assistance or from acts otherwise attributable to any State under chapter II. The article covers both the implicated and the acting State. It makes it clear that chapter IV is concerned only with situations in which the act which lies at the origin of the wrong is an act committed by one State and not by the other. If both States commit the act, then that situation would fall within the realm of co-perpetrators, dealt with in chapter II.

Chapter V

Circumstances precluding wrongfulness

(1) Chapter V sets out six circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned. The existence in a given case of a circumstance precluding wrongfulness in accordance with this chapter provides a shield against an otherwise well-founded claim for the breach of an international obligation. The six circumstances are: consent (article 20), self-defence (article 21), countermeasures (article 22), *force majeure* (article 23), distress (article 24) and necessity (article 25). Article 26 makes it clear that none of these circumstances can be relied on if to do so would conflict with a peremptory norm of general international law. Article 27 deals with certain consequences of the invocation of one of these circumstances.

(2) Consistently with the approach of the present articles, the circumstances precluding wrongfulness set out in chapter V are of general application. Unless otherwise provided,³²⁴ they apply to any internationally wrongful act whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act or from any other source. They do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists. This was emphasized by the International Court in the *Gabčíkovo-Nagymaros Project* case. Hungary sought to argue that the wrongfulness of its conduct in discontinuing work on the Project in breach of its obligations under the 1977 Treaty was precluded by necessity. In dealing with the Hungarian plea, the Court said:

“The state of necessity claimed by Hungary - supposing it to have been established - thus could not permit of the conclusion that ... it had acted in accordance with its obligations

³²⁴ E.g., by a treaty to the contrary, which would constitute a *lex specialis* under article 55.

under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did.”³²⁵

Thus a distinction must be drawn between the effect of circumstances precluding wrongfulness and the termination of the obligation itself. The circumstances in chapter V operate as a shield rather than a sword. As Fitzmaurice noted, where one of the circumstances precluding wrongfulness applies, “the non-performance is not only justified, but ‘looks towards’ a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present ...”³²⁶

(3) This distinction emerges clearly from the decisions of international tribunals. In the *Rainbow Warrior* arbitration, the Tribunal held that both the law of treaties and the law of State responsibility had to be applied, the former to determine whether the treaty was still in force, the latter to determine what the consequences were of any breach of the treaty while it was in force, including the question whether the wrongfulness of the conduct in question was precluded.³²⁷ In the *Gabčíkovo-Nagymaros Project* case, the Court noted that:

“Even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but - unless the parties by mutual agreement terminate the treaty - it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.”³²⁸

³²⁵ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports 1997*, p. 7, at p. 39, para. 48.

³²⁶ Fitzmaurice, “Fourth Report on the Law of Treaties”, *Yearbook ... 1959*, vol. II, p. 41.

³²⁷ *Rainbow Warrior (New Zealand/France)*, *UNRIAA*, vol. XX, p. 217 (1990), at pp. 251-252, para. 75.

³²⁸ *I.C.J. Reports 1997*, p. 7, at p. 63, para. 101; see also p. 38, para. 47.

(4) While the same facts may amount, for example, to *force majeure* under article 23 and to a supervening impossibility of performance under article 61 of the Vienna Convention on the Law of Treaties,³²⁹ the two are distinct. *Force majeure* justifies non-performance of the obligation for so long as the circumstance exists; supervening impossibility justifies the termination of the treaty or its suspension in accordance with the conditions laid down in article 61. The former operates in respect of the particular obligation, the latter with respect to the treaty which is the source of that obligation. Just as the scope of application of the two doctrines is different, so is their mode of application. *Force majeure* excuses non-performance for the time being, but a treaty is not automatically terminated by supervening impossibility: at least one of the parties must decide to terminate it.

(5) The concept of circumstances precluding wrongfulness may be traced to the work of the Preparatory Committee of the 1930 Hague Conference. Among its Bases of Discussion,³³⁰ it listed two “Circumstances under which States can decline their responsibility”, self-defence and reprisals.³³¹ It considered that the extent of a State’s responsibility in the context of diplomatic protection could also be affected by the “provocative attitude” adopted by the injured person (Basis of Discussion No. 19) and that a State could not be held responsible for damage caused by its armed forces “in the suppression of an insurrection, riot or other disturbance” (Basis of Discussion No. 21). However, these issues were not taken to any conclusion.

(6) The category of circumstances precluding wrongfulness was developed by the International Law Commission in its work on international responsibility for injuries to aliens³³²

³²⁹ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

³³⁰ *Yearbook ... 1956*, vol. II, pp. 223-225.

³³¹ *Ibid.*, pp. 224-225. Issues raised by the Calvo clause and the exhaustion of local remedies were dealt with under the same heading.

³³² *Yearbook ... 1958*, vol. II, p. 72. For the discussion of the circumstances by García Amador, see his “First Report on State responsibility”, *Yearbook ... 1956*, vol. II, pp. 203-209 and his “Third Report on State responsibility”, *Yearbook ... 1958*, vol. II, pp. 50-55.

and the performance of treaties.³³³ In the event the subject of excuses for the non-performance of treaties was not included within the scope of the Vienna Convention on the Law of Treaties.³³⁴ It is a matter for the law on State responsibility.

(7) Circumstances precluding wrongfulness are to be distinguished from other arguments which may have the effect of allowing a State to avoid responsibility. They have nothing to do with questions of the jurisdiction of a court or tribunal over a dispute or the admissibility of a claim. They are to be distinguished from the constituent requirements of the obligation, i.e., those elements which have to exist for the issue of wrongfulness to arise in the first place and which are in principle specified by the obligation itself. In this sense the circumstances precluding wrongfulness operate like defences or excuses in internal legal systems, and the circumstances identified in chapter V are recognized by many legal systems, often under the same designation.³³⁵ On the other hand, there is no common approach to these circumstances in internal law, and the conditions and limitations in chapter V have been developed independently.

(8) Just as the Articles do not deal with questions of the jurisdiction of courts or tribunals, so they do not deal with issues of evidence or the burden of proof. In a bilateral dispute over State responsibility, the onus of establishing responsibility lies in principle on the claimant State. Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance under chapter V, however, the position changes and the onus lies on that State to justify or excuse its conduct. Indeed, it is often the case that only that State is fully aware of the facts which might excuse its non-performance.

(9) Chapter V sets out the circumstances precluding wrongfulness presently recognized under general international law.³³⁶ Certain other candidates have been excluded. For example,

³³³ Fitzmaurice, "Fourth Report on the Law of Treaties", *Yearbook ... 1959*, vol. II, pp. 44-47, and for his commentary, *ibid.*, pp. 63-74.

³³⁴ See article 73 of the Vienna Convention on the Law of Treaties.

³³⁵ See the comparative review by C. von Bar, *The Common European Law of Torts*, vol. 2 (Munich, Beck, 2000), pp. 499-592.

³³⁶ For the effect of contribution to the injury by the injured State or other person or entity see article 39 and commentary. This does not preclude wrongfulness but is relevant in determining the extent and form of reparation.

the exception of non-performance (*exceptio inadimpleti contractus*) is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness.³³⁷ The principle that a State may not benefit from its own wrongful act is capable of generating consequences in the field of State responsibility but it is rather a general principle than a specific circumstance precluding wrongfulness.³³⁸ The so-called “clean hands” doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied. It also does not need to be included here.³³⁹

Article 20

Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Commentary

(1) Article 20 reflects the basic international law principle of consent in the particular context of Part I. In accordance with this principle, consent by a State to particular conduct by another State precludes the wrongfulness of that act in relation to the consenting State, provided the consent is valid and to the extent that the conduct remains within the limits of the consent given.

³³⁷ Compare *Diversion of Water from the Meuse (Netherlands v. Belgium)*, 1937, P.C.I.J., Series A/B, No. 70, p. 4, esp. at pp. 50, 77. See further Fitzmaurice, “Fourth Report on the Law of Treaties”, *Yearbook...* 1959, vol. II, pp. 43-47; D.W. Greig, “Reciprocity, Proportionality and the Law of Treaties”, *Virginia Journal of International Law*, vol. 34 (1994), p. 295; and for a comparative review, G.H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford, Clarendon Press, 1987), pp. 245-317. For the relationship between the exception of non-performance and countermeasures see below, commentary to Part Three, chapter II, para. (5).

³³⁸ See e.g. *Factory at Chorzów, Jurisdiction*, 1927, P.C.I.J., Series A, No. 9, p. 31; cf. *Gabčíkovo-Nagymaros Project*, I.C.J. Reports 1997, p. 7, at p. 67, para. 110.

³³⁹ See J.J.A. Salmon, “Des ‘mains propres’ comme condition de recevabilité des réclamations internationales”, *A.F.D.I.*, vol. 10 (1964), p. 225; A. Miaja de la Muela, “Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux”, in *Mélanges offerts à Juraj Andrassy* (The Hague, Martinus Nijhoff, 1968), p. 189, and the dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, I.C.J. Reports 1986, p. 14, at pp. 392-394.

(2) It is a daily occurrence that States consent to conduct of other States which, without such consent, would constitute a breach of an international obligation. Simple examples include transit through the airspace or internal waters of a State, the location of facilities on its territory or the conduct of official investigations or inquiries there. But a distinction must be drawn between consent in relation to a particular situation or a particular course of conduct, and consent in relation to the underlying obligation itself. In the case of a bilateral treaty the States parties can at any time agree to terminate or suspend the treaty, in which case obligations arising from the treaty will be terminated or suspended accordingly.³⁴⁰ But quite apart from that possibility, States have the right to dispense with the performance of an obligation owed to them individually, or generally to permit conduct to occur which (absent such permission) would be unlawful so far as they are concerned. In such cases, the primary obligation continues to govern the relations between the two States, but it is displaced on the particular occasion or for the purposes of the particular conduct by reason of the consent given.

(3) Consent to the commission of otherwise wrongful conduct may be given by a State in advance or even at the time it is occurring. By contrast cases of consent given after the conduct has occurred are a form of waiver or acquiescence, leading to loss of the right to invoke responsibility. This is dealt with in article 45.

(4) In order to preclude wrongfulness, consent dispensing with the performance of an obligation in a particular case must be “valid”. Whether consent has been validly given is a matter addressed by international law rules outside the framework of State responsibility. Issues include whether the agent or person who gave the consent was authorized to do so on behalf of the State (and if not, whether the lack of that authority was known or ought to have been known to the acting State), or whether the consent was vitiated by coercion or some other factor.³⁴¹ Indeed there may be a question whether the State could validly consent at all. The reference to a “valid consent” in article 20 highlights the need to consider these issues in certain cases.

³⁴⁰ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 54 (b).

³⁴¹ See, e.g., the issue of Austrian consent to the *Anschluss* of 1938, dealt with by the Nürnberg Tribunal. The Tribunal denied that Austrian consent had been given; even if it had, it would have been coerced and did not excuse the annexation. See International Military Tribunal for the Trial of German Major War Criminals, judgment of 1 October 1946, reprinted in *A.J.I.L.*, vol. 41 (1947) p. 172, at pp. 192-194.

(5) Whether a particular person or entity had the authority to grant consent in a given case is a separate question from whether the conduct of that person or entity was attributable to the State for the purposes of chapter II. For example, the issue has arisen whether consent expressed by a regional authority could legitimize the sending of foreign troops into the territory of a State, or whether such consent could only be given by the central government, and such questions are not resolved by saying that the acts of the regional authority are attributable to the State under article 4.³⁴² In other cases, the “legitimacy” of the government which has given the consent has been questioned. Sometimes the validity of consent has been questioned because the consent was expressed in violation of relevant provisions of the State’s internal law. These questions depend on the rules of international law relating to the expression of the will of the State, as well as rules of internal law to which, in certain cases, international law refers.

(6) Who has authority to consent to a departure from a particular rule may depend on the rule. It is one thing to consent to a search of embassy premises, another to the establishment of a military base on the territory of a State. Different officials or agencies may have authority in different contexts, in accordance with the arrangements made by each State and general principles of actual and ostensible authority. But in any case, certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion. In this respect, the principles concerning the validity of consent to treaties provide relevant guidance.

(7) Apart from drawing attention to prerequisites to a valid consent, including issues of the authority to consent, the requirement for consent to be valid serves a further function. It points to the existence of cases in which consent may not be validly given at all. This question is discussed in relation to article 26 (compliance with peremptory norms), which applies to Part V as a whole.³⁴³

³⁴² This issue arose with respect to the dispatch of Belgian troops to the Republic of Congo in 1960. See *S.C.O.R., Fifteenth Year*, 873rd meeting, 13-14 July 1960, particularly the statement of the representative of Belgium, paras. 186-188, 209.

³⁴³ See commentary to article 26, para. (6).

(8) Examples of consent given by a State which has the effect of rendering certain conduct lawful include commissions of inquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, humanitarian relief and rescue operations and the arrest or detention of persons on foreign territory. In the *Savarkar* case, the arbitral tribunal considered that the arrest of Savarkar was not a violation of French sovereignty as France had implicitly consented to the arrest through the conduct of its gendarme, who aided the British authorities in the arrest.³⁴⁴ In considering the application of article 20 to such cases it may be necessary to have regard to the relevant primary rule. For example, only the head of a diplomatic mission can consent to the receiving State's entering the premises of the mission.³⁴⁵

(9) Article 20 is concerned with the relations between the two States in question. In circumstances where the consent of a number of States is required, the consent of one State will not preclude wrongfulness in relation to another.³⁴⁶ Furthermore, where consent is relied on to preclude wrongfulness, it will be necessary to show that the conduct fell within the limits of the consent. Consents to overflight by commercial aircraft of another State would not preclude the wrongfulness of overflight by aircraft transporting troops and military equipment. Consent to the stationing of foreign troops for a specific period would not preclude the wrongfulness of the stationing of such troops beyond that period.³⁴⁷ These limitations are indicated by the words "given act" in article 20 as well as by the phrase "within the limits of that consent".

³⁴⁴ *UNRIIAA.*, vol. XI, p. 243 (1911), at pp. 252-255.

³⁴⁵ Vienna Convention on Diplomatic Relations, United Nations, *Treaty Series*, vol. 500, p. 95, art. 22 (1).

³⁴⁶ Austrian consent to the proposed customs union of 1931 would not have precluded its wrongfulness in regard of the obligation to respect Austrian independence owed by Germany to all the Parties to the Treaty of Versailles. Likewise, Germany's consent would not have precluded the wrongfulness of the customs union in respect of the obligation of the maintenance of its complete independence imposed on Austria by the Treaty of St. Germain. See *Customs Regime between Germany and Austria, 1931, P.C.I.J., Series A/B, No. 41*, p. 37, at pp. 46, 49.

³⁴⁷ The non-observance of a condition placed on the consent will not necessarily take conduct outside of the limits of the consent. For example, consent to a visiting force on the territory of a State may be subject to a requirement to pay rent for the use of facilities. While the non-payment of the rent would no doubt be a wrongful act, it would not transform the visiting force into an army of occupation.

(10) Article 20 envisages only the consent of States to conduct otherwise in breach of an international obligation. International law may also take into account the consent of non-State entities such as corporations or private persons. The extent to which investors can waive the rules of diplomatic protection by agreement in advance has long been controversial, but under the Washington Convention of 1965, consent by an investor to arbitration under the Convention has the effect of suspending the right of diplomatic protection by the investor's national State.³⁴⁸ The rights conferred by international human rights treaties cannot be waived by their beneficiaries, but the individual's free consent may be relevant to their application.³⁴⁹ In these cases the particular rule of international law itself allows for the consent in question and deals with its effect. By contrast article 20 states a general principle so far as enjoyment of the rights and performance of the obligations of States are concerned.

Article 21

Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Commentary

(1) The existence of a general principle admitting self-defence as an exception to the prohibition against the use of force in international relations is undisputed. Article 51 of the Charter of the United Nations preserves a State's "inherent right" of self-defence in the face of an armed attack and forms part of the definition of the obligation to refrain from the threat or use of force laid down in Article 2, paragraph (4). Thus a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph (4).³⁵⁰

³⁴⁸ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, United Nations, *Treaty Series*, vol. 575, p. 159, art. 27 (1).

³⁴⁹ See, e.g., International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, p. 171, arts. 7; 8 (3); 14 (1) (g); 23 (3).

³⁵⁰ Cf. *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, p. 226, at p. 244, para. 38; p. 263, para. 96, emphasizing the lawfulness of the use of force in self-defence.

(2) Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph (4), of the Charter, provided that such non-performance is related to the breach of that provision. Traditional international law dealt with these problems by instituting a separate legal regime of war, defining the scope of belligerent rights and suspending most treaties in force between the belligerents on the outbreak of war.³⁵¹ In the Charter period, declarations of war are exceptional and military actions proclaimed as self-defence by one or both parties occur between States formally at “peace” with each other.³⁵² The Vienna Convention on the Law of Treaties leaves such issues to one side by providing in article 73 that the Convention does not prejudice “any question that may arise in regard to a treaty ... from the outbreak of hostilities between States”.

(3) This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions of 1949 and Protocol I of 1977 apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law.³⁵³ Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self-defence. As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.

³⁵¹ See further A. McNair & A. D. Watts, *Legal Effects of War* (4th edn.) (Cambridge, Cambridge University Press, 1966), p. 579.

³⁵² In *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objection*, *I.C.J. Reports 1996*, p. 803, it was not denied that the Treaty of Amity of 1955 remained in force, despite many actions by United States naval forces against Iran. In that case both parties agreed that to the extent that any such actions were justified by self-defence they would be lawful.

³⁵³ As the Court said of the rules of international humanitarian law in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, p. 226, at p. 257, para. 79, they constitute “intransgressible principles of international customary law”. On the relationship between human rights and humanitarian law in time of armed conflict, see *ibid.*, p. 240, para. 25.

(4) The International Court in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* provided some guidance on this question. One issue before the Court was whether a use of nuclear weapons would necessarily be a breach of environmental obligations because of the massive and long-term damage such weapons can cause. The Court said:

“[T]he issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict. The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.”³⁵⁴

A State acting in self-defence is “totally restrained” by an international obligation if that obligation is expressed or intended to apply as a definitive constraint even to States in armed conflict.³⁵⁵

(5) The essential effect of article 21 is to preclude the wrongfulness of conduct of a State acting in self-defence vis-à-vis an attacking State. But there may be effects vis-à-vis third States in certain circumstances. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court observed that:

“[A]s in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons may be used.”³⁵⁶

³⁵⁴ *I.C.J. Reports 1996*, p. 226, at p. 242, para. 30.

³⁵⁵ See, e.g., Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, United Nations, *Treaty Series*, vol. 1108, p. 151.

³⁵⁶ *I.C.J. Reports 1996*, p. 226, at p. 261, para. 89.

The law of neutrality distinguishes between conduct as against a belligerent and conduct as against a neutral. But neutral States are not unaffected by the existence of a state of war.

Article 21 leaves open all issues of the effect of action in self-defence vis-à-vis third States.

(6) Thus article 21 reflects the generally accepted position that self-defence precludes the wrongfulness of the conduct taken within the limits laid down by international law. The reference is to action “taken in conformity with the Charter of the United Nations”. In addition, the term “lawful” implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter.

Article 22

Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.

Commentary

(1) In certain circumstances, the commission by one State of an internationally wrongful act may justify another State injured by that act in taking non-forcible countermeasures in order to procure its cessation and to achieve reparation for the injury. Article 22 deals with this situation from the perspective of circumstances precluding wrongfulness. Chapter II of Part Three regulates countermeasures in further detail.

(2) Judicial decisions, State practice and doctrine confirm the proposition that countermeasures meeting certain substantive and procedural conditions may be legitimate. In the *Gabčíkovo-Nagymaros Project* case, the International Court clearly accepted that countermeasures might justify otherwise unlawful conduct “taken in response to a previous international wrongful act of another State and ... directed against that State”,³⁵⁷ provided certain

³⁵⁷ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, at p. 55, para. 83.

conditions are met. Similar recognition of the legitimacy of measures of this kind in certain cases can be found in arbitral decisions, in particular the *Naulilaa*,³⁵⁸ *Cysne*,³⁵⁹ and *Air Services*³⁶⁰ awards.

(3) In the literature concerning countermeasures, reference is sometimes made to the application of a “sanction”, or to a “reaction” to a prior internationally wrongful act; historically the more usual terminology was that of “legitimate reprisals” or, more generally, measures of “self-protection” or “self-help”. The term “sanctions” has been used for measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the United Nations Charter - despite the fact that the Charter uses the term “measures”, not “sanctions”. The term “reprisals” is now no longer widely used in the present context, because of its association with the law of belligerent reprisals involving the use of force. At least since the *Air Services* arbitration,³⁶¹ the term “countermeasures” has been preferred, and it has been adopted for the purposes of the present Articles.

(4) Where countermeasures are taken in accordance with article 22, the underlying obligation is not suspended, still less terminated; the wrongfulness of the conduct in question is precluded for the time being by reason of its character as a countermeasure, but only provided that and for so long as the necessary conditions for taking countermeasures are satisfied. These conditions are set out in Part Three, chapter II, to which article 22 refers. As a response to internationally wrongful conduct of another State countermeasures may be justified only in relation to that State. This is emphasized by the phrases “if and to the extent” and “countermeasures taken against” the responsible State. An act directed against a third State would not fit this definition and could not be justified as a countermeasure. On the other hand, indirect or consequential effects of countermeasures on third parties, which do not involve an independent breach of any obligation to those third parties, will not take a countermeasure outside the scope of article 22.

³⁵⁸ “*Naulilaa*” (*Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa*), *UNRIAA*, vol. II, p. 1011 (1928), at pp. 1025-1026.

³⁵⁹ “*Cysne*” (*Responsibility of Germany for acts committed subsequent to 31 July 1914 and before Portugal entered into the war*), *UNRIAA*, vol. II, p. 1035 (1930), at p. 1052.

³⁶⁰ *Air Services Agreement of 27 March 1946 (United States v. France)*, *UNRIAA*, vol. XVIII, p. 416 (1979).

³⁶¹ *Ibid.*, vol. XVIII, p. 416 (1979), especially at pp. 443-446, paras. 80-98.

(5) Countermeasures may only preclude wrongfulness in the relations between an injured State and the State which has committed the internationally wrongful act. The principle is clearly expressed in the *Cysne* case, where the Tribunal stressed that ...

“reprisals, which constitute an act in principle contrary to the law of nations, are defensible only in so far as they were *provoked* by some other act likewise contrary to that law. *Only reprisals taken against the provoking State are permissible*. Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavour to avoid or to limit as far as possible.”³⁶²

Accordingly the wrongfulness of Germany’s conduct vis-à-vis Portugal was not precluded. Since it involved the use of armed force, this decision concerned belligerent reprisals rather than countermeasures in the sense of article 22. But the same principle applies to countermeasures, as the Court confirmed in the *Gabčíkovo-Nagymaros Project* case when it stressed that the measure in question must be “directed against” the responsible State.³⁶³

(6) If article 22 had stood alone, it would have been necessary to spell out other conditions for the legitimacy of countermeasures, including in particular the requirement of proportionality, the temporary or reversible character of countermeasures and the status of certain fundamental obligations which may not be subject to countermeasures. Since these conditions are dealt with in Part Three, chapter II, it is sufficient to make a cross-reference to them here. Article 22 covers any action which qualifies as a countermeasure in accordance with those conditions. One issue is whether countermeasures may be taken by third States which are not themselves individually injured by the internationally wrongful act in question, although they are owed the obligation which has been breached.³⁶⁴ For example, in the case of an obligation owed to the international community as a whole the International Court has affirmed that all States have a legal interest in

³⁶² Ibid., vol. II, p. 1035 (1930), at pp. 1056-1057 (emphasis in original).

³⁶³ *I.C.J. Reports 1997*, p. 7, at p. 55, para. 83.

³⁶⁴ For the distinction between injured States and other States entitled to invoke State responsibility see articles 42 and 48 and commentaries.

compliance.³⁶⁵ Article 54 leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State. While article 22 does not cover measures taken in such a case to the extent that these do not qualify as countermeasures, neither does it exclude that possibility.

Article 23

Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.
2. Paragraph 1 does not apply if:
 - (a) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - (b) The State has assumed the risk of that situation occurring.

Commentary

- (1) *Force majeure* is quite often invoked as a ground for precluding the wrongfulness of an act of a State.³⁶⁶ It involves a situation where the State in question is in effect compelled to act in a manner not in conformity with the requirements of an international obligation incumbent upon it. *Force majeure* differs from a situation of distress (article 24) or necessity (article 25) because the conduct of the State which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice.
- (2) A situation of *force majeure* precluding wrongfulness only arises where three elements are met: (a) the act in question must be brought about by an irresistible force or an unforeseen event, (b) which is beyond the control of the State concerned, and (c) which makes it materially impossible in the circumstances to perform the obligation. The adjective “irresistible” qualifying

³⁶⁵ *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33.

³⁶⁶ See *Secretariat Survey*, “‘Force majeure’ and ‘fortuitous event’ as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine”, *Yearbook ... 1978*, vol. II, Part One, p. 61.

the word “force” emphasizes that there must be a constraint which the State was unable to avoid or oppose by its own means. To have been “unforeseen” the event must have been neither foreseen nor of an easily foreseeable kind. Further the “irresistible force” or “unforeseen event” must be causally linked to the situation of material impossibility, as indicated by the words “due to *force majeure* ... making it materially impossible”. Subject to paragraph 2, where these elements are met the wrongfulness of the State’s conduct is precluded for so long as the situation of *force majeure* subsists.

(3) Material impossibility of performance giving rise to *force majeure* may be due to a natural or physical event (e.g., stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or to human intervention (e.g., loss of control over a portion of the State’s territory as a result of an insurrection or devastation of an area by military operations carried out by a third State), or some combination of the two. Certain situations of duress or coercion involving force imposed on the State may also amount to *force majeure* if they meet the various requirements of article 23. In particular the situation must be irresistible, so that the State concerned has no real possibility of escaping its effects. *Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis. Nor does it cover situations brought about by the neglect or default of the State concerned,³⁶⁷ even if the resulting injury itself was accidental and unintended.³⁶⁸

³⁶⁷ E.g., in relation to occurrences such as the bombing of La-Chaux-de-Fonds by German airmen on 17 October 1915, and of Porrentruy by a French airman on 26 April 1917, ascribed to negligence on the part of the airmen, the belligerent undertook to punish the offenders and make reparation for the damage suffered: *Secretariat Survey*, paras. 255-256.

³⁶⁸ E.g., in 1906 an American officer on the U.S.S. *Chattanooga* was mortally wounded by a bullet from a French warship as his ship entered the Chinese harbour of Chefoo. The United States Government obtained reparation, having maintained that:

“While the killing of Lieutenant England can only be viewed as an accident, it cannot be regarded as belonging to the unavoidable class whereby no responsibility is entailed. Indeed, it is not conceivable how it could have occurred without the contributory element of lack of proper precaution on the part of those officers of the *Dupetit Thouars* who were in responsible charge of the rifle firing practice and who failed to stop firing when the *Chattanooga*, in the course of her regular passage through the public channel, came into the line of fire.”

Whiteman, *Damages*, vol. I, p. 221. See also *Secretariat Survey*, para. 130.

(4) In drafting what became article 61 of the Vienna Convention on the Law of Treaties, the International Law Commission took the view that *force majeure* was a circumstance precluding wrongfulness in relation to treaty performance, just as supervening impossibility of performance was a ground for termination of a treaty.³⁶⁹ The same view was taken at the Vienna Conference.³⁷⁰ But in the interests of the stability of treaties, the Conference insisted on a narrow formulation of article 61 so far as treaty termination is concerned. The degree of difficulty associated with *force majeure* as a circumstance precluding wrongfulness, though considerable, is less than is required by article 61 for termination of a treaty on grounds of supervening impossibility, as the International Court pointed out in the *Gabčíkovo-Nagymaros Project* case:

“Article 61, paragraph 1, requires the ‘permanent disappearance or destruction of an object indispensable for the execution’ of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties... Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.”³⁷¹

(5) In practice, many of the cases where “impossibility” has been relied upon have not involved actual impossibility as distinct from increased difficulty of performance and the plea of *force majeure* has accordingly failed. But cases of material impossibility have occurred,

³⁶⁹ *Yearbook ... 1966*, vol. II, p. 255.

³⁷⁰ See, e.g., the proposal of the Mexican representative, *Official Records of the United Nations Conference on the Law of Treaties Documents of the Conference*, pp. 182-189, A/CONF.39/14, para. 531 (a).

³⁷¹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports 1997*, p. 7, at p. 63, para. 102.

e.g. where a State aircraft is forced, due to damage or loss of control of the aircraft due to weather, into the airspace of another State without the latter's authorization. In such cases the principle that wrongfulness is precluded has been accepted.³⁷²

(6) Apart from aerial incidents, the principle in article 23 is also recognized in relation to ships in innocent passage by article 14 (3) of the 1958 Convention on the Territorial Sea and the Contiguous Zone³⁷³ (article 18 (2) of the 1982 United Nations Convention on the Law of the Sea³⁷⁴), as well as in article 7 (1) of the Convention on Transit Trade of Land-locked States of 8 July 1965.³⁷⁵ In these provisions, *force majeure* is incorporated as a constituent element of the relevant primary rule; nonetheless its acceptance in these cases helps to confirm the existence of a general principle of international law to similar effect.

(7) The principle has also been accepted by international tribunals. Mixed claims commissions have frequently cited the unforeseeability of attacks by rebels in denying the responsibility of the territorial State for resulting damage suffered by foreigners.³⁷⁶ In the *Lighthouses* arbitration, a lighthouse owned by a French company had been requisitioned by the

³⁷² See, e.g., the cases of accidental intrusion into airspace attributable to weather, and the cases of accidental bombing of neutral territory attributable to navigational errors during the First World War discussed in the *Secretariat Survey*, paras. 250-256. See also the exchanges of correspondence between the States concerned in the incidents involving United States military aircraft entering the airspace of Yugoslavia in 1946: United States of America, *Department of State Bulletin*, vol. XV, No. 376 (15 September 1946), p. 502, reproduced in *Secretariat Survey*, para. 144, and the incident provoking the application to the International Court in 1954: *I.C.J. Pleadings, Treatment in Hungary of Aircraft and Crew of the United States of America*, p. 14 (note to the Hungarian Government of 17 March 1953). It is not always clear whether these cases are based on distress or *force majeure*.

³⁷³ United Nations, *Treaty Series*, vol. 516, p. 205.

³⁷⁴ United Nations, *Treaty Series*, vol. 1833, p. 397.

³⁷⁵ United Nations, *Treaty Series*, vol. 597, p. 42.

³⁷⁶ See, e.g., the decision of the American-British Claims Commission in the *Saint Albans Raid* case (1873), Moore, *International Arbitrations*, vol. IV, p. 4042; *Secretariat Survey*, para. 339; the decisions of the United States/Venezuelan Claims Commission in the *Wipperman* case, Moore, *International Arbitrations*, vol. III, p. 3039; *Secretariat Survey*, paras. 349-350; *De Brissot and others* cases, Moore, *International Arbitrations*, vol III, p. 2967; *Secretariat Survey*, para. 352; and the decision of the British Mexican Claims Commission in the *Gill* case: *UNRIAA*, vol. V, p. 157 (1931); *Secretariat Survey*, para. 463.

Greek Government in 1915 and was subsequently destroyed by enemy action. The arbitral tribunal denied the French claim for restoration of the lighthouse on grounds of *force majeure*.³⁷⁷ In the *Russian Indemnity* case, the principle was accepted but the plea of *force majeure* failed because the payment of the debt was not materially impossible.³⁷⁸ *Force majeure* was acknowledged as a general principle of law (though again the plea was rejected on the facts of the case) by the Permanent Court of International Justice in the *Serbian Loans* and *Brazilian Loans* cases.³⁷⁹ More recently, in the *Rainbow Warrior* arbitration, France relied on *force majeure* as a circumstance precluding the wrongfulness of its conduct in removing the officers from Hao and not returning them following medical treatment. The Tribunal dealt with the point briefly:

“New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*.”³⁸⁰

(8) In addition to its application in inter-State cases as a matter of public international law, *force majeure* has substantial currency in the field of international commercial arbitration, and may qualify as a general principle of law.³⁸¹

³⁷⁷ *Ottoman Empire Lighthouses Concession*, UNRIAA, vol. XII, p. 155 (1956), at pp. 219-220.

³⁷⁸ *Ibid.*, vol. XI, p. 421 (1912), at p. 443.

³⁷⁹ *Serbian Loans*, 1929, P.C.I.J., Series A, No. 20, at pp. 33-40; *Brazilian Loans*, 1929, P.C.I.J., Series A, No. 21, at p. 120.

³⁸⁰ *Rainbow Warrior (New Zealand/France)*, UNRIAA, vol. XX, p. 217 (1990), at p. 253.

³⁸¹ On *force majeure* in the case law of the Iran-United States Claims Tribunal, see G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), pp. 306-320. *Force majeure* has also been recognized as a general principle of law by the European Court of Justice: see, e.g., Case 145/85, *Denkavit Belgie NV v. Belgium*, [1987] E.C.R. 565; Case 101/84, *Commission v. Italy*, [1985] E.C.R. 2629. See also art. 79 of the UNCITRAL Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, U.N.T.S., vol. 1489, p. 58; P. Schlechtriem & G. Thomas, *Commentary on the United Nations Convention on the International Sale of Goods* (2nd edn.) (Oxford, Clarendon Press, 1998), pp. 600-626; and art. 7.1.7 of the UNIDROIT Principles of International Commercial Contracts, in UNIDROIT, *Principles of International Commercial Contracts* (Rome, 1994), pp. 169-171.

(9) A State may not invoke *force majeure* if it has caused or induced the situation in question. In *Libyan Arab Foreign Investment Company v. Republic of Burundi*,³⁸² the Arbitral Tribunal rejected a plea of *force majeure* because “the alleged impossibility [was] not the result of an irresistible force or an unforeseen external event beyond the control of Burundi. In fact, the impossibility is the result of a unilateral decision of that State ...”³⁸³ Under the equivalent ground for termination of a treaty in article 61 of the Vienna Convention on the Law of Treaties, material impossibility cannot be invoked “if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty”. By analogy with this provision, subparagraph (2) (a) excludes the plea in circumstances where *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it. For subparagraph 2 (a) to apply it is not enough that the State invoking *force majeure* has contributed to the situation of material impossibility; the situation of *force majeure* must be “due” to the conduct of the State invoking it. This allows for *force majeure* to be invoked in situations in which a State may have unwittingly contributed to the occurrence of material impossibility by something which, in hindsight, might have been done differently but which was done in good faith and did not itself make the event any less unforeseen. Subparagraph 2 (a) requires that the State’s role in the occurrence of *force majeure* must be substantial.

(10) Subparagraph 2 (b) deals with situations in which the State has already accepted the risk of the occurrence of *force majeure*, whether it has done so in terms of the obligation itself or by its conduct or by virtue of some unilateral act. This reflects the principle that *force majeure* should not excuse performance if the State has undertaken to prevent the particular situation arising or has otherwise assumed that risk.³⁸⁴ Once a State accepts the responsibility for a particular risk it cannot then claim *force majeure* to avoid responsibility. But the assumption of risk must be unequivocal and directed towards those to whom the obligation is owed.

³⁸² *I.L.R.*, vol. 96 (1994), p. 279.

³⁸³ *Ibid.* at p. 318, para. 55.

³⁸⁴ As the *Secretariat Survey*, para. 31 points out, States may renounce the right to rely on *force majeure* by agreement. The most common way of doing so would be by an agreement or obligation assuming in advance the risk of the particular *force majeure* event.

Article 24

Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.
2. Paragraph 1 does not apply if:
 - (a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
 - (b) The act in question is likely to create a comparable or greater peril.

Commentary

(1) Article 24 deals with the specific case where an individual whose acts are attributable to the State is in a situation of peril, either personally or in relation to persons under his or her care. The article precludes the wrongfulness of conduct adopted by the State agent in circumstances where the agent had no other reasonable way of saving life. Unlike situations of *force majeure* dealt with in article 23, a person acting under distress is not acting involuntarily, even though the choice is effectively nullified by the situation of peril.³⁸⁵ Nor is it a case of choosing between compliance with international law and other legitimate interests of the State, such as characterize situations of necessity under article 25. The interest concerned is the immediate one of saving people's lives, irrespective of their nationality.

(2) In practice, cases of distress have mostly involved aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure.³⁸⁶ An example is the entry of United States military aircraft into Yugoslavia's airspace in 1946. On two occasions, United States military aircraft entered Yugoslav airspace without authorization and were attacked by Yugoslav air defences. The United States Government protested the Yugoslav

³⁸⁵ For this reason, writers who have considered this situation have often defined it as one of "relative impossibility" of complying with the international obligation. See, e.g., O.J. Lissitzyn, "The Treatment of Aerial Intruders in Recent Practice and International Law", *A.J.I.L.*, vol. 47 (1953), p. 588.

³⁸⁶ See *Secretariat Survey*, "'Force majeure' and 'fortuitous event' as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine", *Yearbook ... 1978*, vol. II, Part One, p. 61, paras. 141-142, 252.

action on the basis that the aircraft had entered Yugoslav airspace solely in order to escape extreme danger. The Yugoslav Government responded by denouncing the systematic violation of its airspace, which it claimed could only be intentional in view of its frequency. A later note from the Yugoslav Chargé d’Affaires informed the American Department of State that Marshal Tito had forbidden any firing on aircraft which flew over Yugoslav territory without authorization, presuming that, for its part, the United States Government “would undertake the steps necessary to prevent these flights, except in the case of emergency or bad weather, for which arrangements could be made by agreement between American and Yugoslav authorities”.³⁸⁷ The reply of the American Acting Secretary of State reiterated the assertion that no American planes had flown over Yugoslavia intentionally without prior authorization from Yugoslav authorities “unless forced to do so in an emergency”. However, the Acting Secretary of State added:

“I presume that the Government of Yugoslavia recognizes that in case a plane and its occupants are jeopardized, the aircraft may change its course so as to seek safety even though such action may result in flying over Yugoslav territory without prior clearance.”³⁸⁸

(3) Claims of distress have also been made in cases of violation of maritime boundaries. For example, in December 1975, after British naval vessels entered Icelandic territorial waters, the United Kingdom Government claimed that the vessels in question had done so in search of “shelter from severe weather, as they have the right to do under customary international law”.³⁸⁹ Iceland maintained that British vessels were in its waters for the sole purpose of provoking an incident, but did not contest the point that if the British vessels had been in a situation of distress, they could enter Icelandic territorial waters.

³⁸⁷ United States, *Department of State Bulletin*, vol. XV (15 September 1946), p. 502, reproduced in *Secretariat Survey*, para. 144.

³⁸⁸ *Secretariat Survey*, para. 145. The same argument is found in the Memorial of 2 December 1958 submitted by the United States Government to the International Court of Justice in relation to another aerial incident: see *I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 358-359.

³⁸⁹ *S.C.O.R., Thirtieth Year*, 1866th meeting., 16 December 1975; *Secretariat Survey*, para. 136.

(4) Although historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases.³⁹⁰ The *Rainbow Warrior* arbitration involved a plea of distress as a circumstance precluding wrongfulness outside the context of ships or aircraft. France sought to justify its conduct in removing the two officers from the island of Hao on the ground of “circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State”.³⁹¹ The Tribunal unanimously accepted that this plea was admissible in principle, and by majority that it was applicable to the facts of one of the two cases. As to the principle, the Tribunal required France to show three things:

- “(1) The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated.
- (2) The re-establishment of the original situation of compliance with the assignment in Hao as soon as the reasons of emergency invoked to justify the repatriation had disappeared.
- (3) The existence of a good-faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement.”³⁹²

In fact the danger to one of the officers, though perhaps not life-threatening, was real and might have been imminent, and it was not denied by the New Zealand physician who subsequently examined him. By contrast, in the case of the second officer, the justifications given (the need

³⁹⁰ There have also been cases involving the violation of a land frontier in order to save the life of a person in danger. See, e.g., the case of violation of the Austrian border by Italian soldiers in 1862: *Secretariat Survey*, para. 121.

³⁹¹ *Rainbow Warrior (New Zealand/France)*, *UNRIIAA*, vol. XX, p. 217 (1990), at pp. 254-255, para. 78.

³⁹² *Ibid.*, at p. 255, para. 79.

for medical examination on grounds of pregnancy and the desire to see a dying father) did not justify emergency action. The lives of the agent and the child were at no stage threatened and there were excellent medical facilities nearby. The Tribunal held that:

“[C]learly these circumstances entirely fail to justify France’s responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations ...”³⁹³

(5) The plea of distress is also accepted in many treaties as a circumstance justifying conduct which would otherwise be wrongful. Article 14 (3) of the 1958 Convention on the Territorial Sea and the Contiguous Zone permits stopping and anchoring by ships during their passage through foreign territorial seas in so far as this conduct is rendered necessary by distress. This provision is repeated in much the same terms in article 18 (2) of the 1982 Convention on the Law of the Sea.³⁹⁴ Similar provisions appear in the international conventions on the prevention of pollution at sea.³⁹⁵

(6) Article 24 is limited to cases where human life is at stake. The Tribunal in the *Rainbow Warrior* arbitration appeared to take a broader view of the circumstances justifying a plea of distress, apparently accepting that a serious health risk would suffice. The problem with extending article 24 to less than life-threatening situations is where to place any lower limit.

³⁹³ Ibid., at p. 263, para. 99.

³⁹⁴ United Nations Convention on the Law of the Sea, Montego Bay, United Nations, *Treaty Series*, vol. 1833, p. 397; see also arts. 39 (1) (c), 98 and 109.

³⁹⁵ See, e.g., International Convention for the Prevention of Pollution of the Sea by Oil, United Nations, *Treaty Series*, vol. 327, p. 3, art. IV (1) (a), providing that the prohibition on the discharge of oil into the sea does not apply if the discharge takes place “for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea”. See also the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, United Nations, *Treaty Series*, vol. 1046, p. 138, art V (1), which provides that the prohibition on dumping of wastes does not apply when it is “necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea ... in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping appears to be the only way of averting the threat ...”. Cf. also Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, Oslo, United Nations, *Treaty Series*, vol. 932, p. 3, art. 8 (1) International Convention for the Prevention of Pollution from Ships (MARPOL), United Nations, *Treaty Series*, vol. 1340, p. 184, Annex 1, regulation 11 (a).

In situations of distress involving aircraft there will usually be no difficulty in establishing that there is a threat to life, but other cases present a wide range of possibilities. Given the context of chapter V and the likelihood that there will be other solutions available for cases which are not apparently life-threatening, it does not seem necessary to extend the scope of distress beyond threats to life itself. In situations in which a State agent is in distress and has to act to save lives, there should however be a certain degree of flexibility in the assessment of the conditions of distress. The “no other reasonable way” criterion in article 24 seeks to strike a balance between the desire to provide some flexibility regarding the choices of action by the agent in saving lives and need to confine the scope of the plea having regard to its exceptional character.

(7) Distress may only be invoked as a circumstance precluding wrongfulness in cases where a State agent has acted to save his or her own life or where there exists a special relationship between the State organ or agent and the persons in danger. It does not extend to more general cases of emergencies, which are more a matter of necessity than distress.

(8) Article 24 only precludes the wrongfulness of conduct so far as it is necessary to avoid the life-threatening situation. Thus it does not exempt the State or its agent from complying with other requirements (national or international), e.g., the requirement to notify arrival to the relevant authorities, or to give relevant information about the voyage, the passengers or the cargo.³⁹⁶

(9) As in the case of *force majeure*, a situation which has been caused or induced by the invoking State is not one of distress. In many cases the State invoking distress may well have contributed, even if indirectly, to the situation. Priority should be given to necessary life-saving measures, however, and under subparagraph (2) (a), distress is only excluded if the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it. This is the same formula as that adopted in respect of article 23 (2) (a).³⁹⁷

³⁹⁶ See *Cushin and Lewis v. R*, [1935] Ex.C.R. 103 (even if a vessel enters a port in distress, it is not exempted from the requirement to report on its voyage). See also *The “Rebecca”* (United States of America-Mexico General Claims Commission) *A.J.I.L.* vol. 23 (1929), 860 (vessel entered port in distress; merchandise seized for customs offence: held, entry reasonably necessary in the circumstances and not a mere matter of convenience; seizure therefore unlawful); *“The May” v. R* [1931] S.C.R. 374; *The Ship “Queen City” v. R* [1931] S.C.R. 387; *R v. Flahaut* [1935] 2 D.L.R. 685 (test of “real and irresistible distress” applied).

³⁹⁷ See commentary to article 23, para. (9).

(10) Distress can only preclude wrongfulness where the interests sought to be protected (e.g., the lives of passengers or crew) clearly outweigh the other interests at stake in the circumstances. If the conduct sought to be excused endangers more lives than it may save or is otherwise likely to create a greater peril it will not be covered by the plea of distress. For instance, a military aircraft carrying explosives might cause a disaster by making an emergency landing, or a nuclear submarine with a serious breakdown might cause radioactive contamination to a port in which it sought refuge. Subparagraph 2 (b) stipulates that distress does not apply if the act in question is likely to create a comparable or greater peril. This is consistent with paragraph 1, which in asking whether the agent had “no other reasonable way” to save life establishes an objective test. The words “comparable or greater peril” must be assessed in the context of the overall purpose of saving lives.

Article 25

Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity.

Commentary

(1) The term “necessity” (“état de nécessité”) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. Under conditions narrowly defined in article 25, such a plea is recognized as a circumstance precluding wrongfulness.

(2) The plea of necessity is exceptional in a number of respects. Unlike consent (article 20), self-defence (article 21) or countermeasures (article 22), it is not dependent on the prior conduct of the injured State. Unlike *force majeure* (article 23), it does not involve conduct which is involuntary or coerced. Unlike distress (article 24), necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.³⁹⁸

(3) There is substantial authority in support of the existence of necessity as a circumstance precluding wrongfulness. It has been invoked by States and has been dealt with by a number of international tribunals. In these cases the plea of necessity has been accepted in principle, or at least not rejected.

(4) In an Anglo-Portuguese dispute of 1832, the Portuguese Government argued that the pressing necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances, had justified its appropriation of property owned by British subjects, notwithstanding a treaty stipulation. The British Government was advised that ...

“the Treaties between this Country and Portugal are [not] of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary

³⁹⁸ Perhaps the classic case of such an abuse was the occupation of Luxembourg and Belgium by Germany in 1914, which Germany sought to justify on the ground of the necessity. See, in particular, the note presented on 2 August 1914 by the German Minister in Brussels to the Belgian Minister for Foreign Affairs, in J.B. Scott (ed.), *Diplomatic Documents Relating to the Outbreak of the European War* (New York, Oxford University Press, 1916), Part I, pp. 749-750, and the speech in the Reichstag by the German Chancellor, von Bethmann-Hollweg, on 4 August 1914, containing the well-known words “wir sind jetzt in der Notwehr; und Not kennt kein Gebot!” (“we are in a state of self-defence and necessity knows no law”). *Jahrbuch des Völkerrechts*, vol. III (1916), p. 728.

to the safety, and even to the very existence of the State. The extent of the necessity, which will justify such an appropriation of the Property of British Subjects, must depend upon the circumstances of the particular case, but it must be imminent and urgent.”³⁹⁹

(5) The “*Caroline*” incident of 1837, though frequently referred to as an instance of self-defence, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it now has. In that case, British armed forces entered United States territory and attacked and destroyed a vessel owned by American citizens which was carrying recruits and military and other material to Canadian insurgents. In response to the American protests, the British Minister in Washington, Fox, referred to the “necessity of self-defence and self-preservation”; the same point was made by counsel consulted by the British Government, who stated that “the conduct of the British Authorities” was justified because it was “absolutely necessary as a measure of precaution”.⁴⁰⁰ Secretary of State Webster replied to Minister Fox that “nothing less than a clear and absolute necessity can afford ground of justification” for the commission “of hostile acts within the territory of a Power at Peace”, and observed that the British Government must prove that the action of its forces had really been caused by “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation”.⁴⁰¹ In his message to Congress of 7 December 1841, President Tyler reiterated that:

“This Government can never concede to any foreign Government the power, except in a case of the most urgent and extreme necessity, of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign Government ...”⁴⁰²

³⁹⁹ A.D. McNair (ed.), *International Law Opinions* (Cambridge, University Press, 1956), vol. II, p. 232.

⁴⁰⁰ See respectively W.R. Manning (ed.), *Diplomatic Correspondence of the United States: Canadian Relations 1784-1860* (Washington, Carnegie Endowment for International Peace, 1943), vol. III, p. 422; A.D. McNair (ed.), *International Law Opinions* (Cambridge, University Press, 1956), vol. II, p. 22.

⁴⁰¹ *British and Foreign State Papers*, vol. 29, p. 1129.

⁴⁰² *British and Foreign State Papers*, vol. 30, p. 194.

The incident was not closed until 1842, with an exchange of letters in which the two Governments agreed that “a strong overpowering necessity may arise when this great principle may and must be suspended”. “It must be so”, added Lord Ashburton, the British Government’s ad hoc envoy to Washington, “for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity.”⁴⁰³

(6) In the “Russian Fur Seals” controversy of 1893, the “essential interest” to be safeguarded against a “grave and imminent peril” was the natural environment in an area not subject to the jurisdiction of any State or to any international regulation. Facing the danger of extermination of a fur seal population by unrestricted hunting, the Russian Government issued a decree prohibiting sealing in an area of the high seas. In a letter to the British Ambassador dated 12/24 February 1893, the Russian Minister for Foreign Affairs explained that the action had been taken because of the “absolute necessity of immediate provisional measures” in view of the imminence of the hunting season. He “emphasize[d] the essentially precautionary character of the above-mentioned measures, which were taken under the pressure of exceptional circumstances”⁴⁰⁴ and declared his willingness to conclude an agreement with the British Government with a view to a longer-term settlement of the question of sealing in the area.

(7) In the *Russian Indemnity* case, the Ottoman Government, to justify its delay in paying its debt to the Russian Government, invoked among other reasons the fact that it had been in an extremely difficult financial situation, which it described as “*force majeure*” but which was more like a state of necessity. The arbitral tribunal accepted the plea in principle:

“*The exception of force majeure*, invoked in the first place, is arguable in international public law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits ... that the obligation for a State to execute treaties may be weakened ‘if the very existence of the State is endangered, if observation of the international duty is ... *self-destructive*’.”⁴⁰⁵

⁴⁰³ Ibid., p. 195. See Secretary of State Webster’s reply: *ibid.*, p. 201.

⁴⁰⁴ *British and Foreign State Papers*, vol. 86, p. 220; *Secretariat Survey*, para. 155.

⁴⁰⁵ *UNRIAA.*, vol. XI, p. 431 (1912), at p. 443; *Secretariat Survey*, para. 394.

It considered, however, that:

“It would be a manifest exaggeration to admit that the payment (or the contracting of a loan for the payment) of the relatively small sum of 6 million francs due to the Russian claimants would have imperilled the existence of the Ottoman Empire or seriously endangered its internal or external situation ...”⁴⁰⁶

In its view, compliance with an international obligation must be “self-destructive” for the wrongfulness of the conduct not in conformity with the obligation to be precluded.⁴⁰⁷

(8) In *Société Commerciale de Belgique*,⁴⁰⁸ the Greek Government owed money to a Belgian company under two arbitral awards. Belgium applied to the Permanent Court of International Justice for a declaration that the Greek Government, in refusing to carry out the awards, was in breach of its international obligations. The Greek Government pleaded the country’s serious budgetary and monetary situation.⁴⁰⁹ The Court noted that it was not within its mandate to declare whether the Greek Government was justified in not executing the arbitral awards. However, the Court implicitly accepted the basic principle, on which the two parties were in agreement.⁴¹⁰

⁴⁰⁶ Ibid.

⁴⁰⁷ A case in which the parties to the dispute agreed that very serious financial difficulties could justify a different mode of discharging the obligation other than that originally provided for arose in connection with the enforcement of the arbitral award in *Forests of Central Rhodope*, UNRIAA, vol. III, p. 1405 (1933): see League of Nations, *Official Journal*, 15th year, No. 11 (Part I) (November 1934), p. 1432.

⁴⁰⁸ *Société Commerciale de Belgique*, 1939, P.C.I.J., Series A/B, No. 78, p. 160.

⁴⁰⁹ P.C.I.J., Series C, No. 87, pp. 141, 190; *Secretariat Survey*, para. 278. See generally for the Greek arguments relative to the state of necessity, *ibid.*, paras. 276-287.

⁴¹⁰ *Société Commerciale de Belgique*, 1939, P.C.I.J., Series A/B, No. 78, p. 160; *Secretariat Survey*, para. 288. See also the *Serbian Loans* case, where the positions of the parties and the Court on the point were very similar: *Serbian Loans*, 1929, P.C.I.J., Series A, No. 20; *Secretariat Survey*, paras. 263-268; *French Company of Venezuela Railroads*, UNRIAA., vol. X, p. 285 (1902), at p. 353; *Secretariat Survey*, paras. 385-386. In his separate opinion in the *Oscar Chinn* case, Judge Anzilotti accepted the principle that “necessity may excuse the non-observance of international obligations” but denied its applicability on the facts: *Oscar Chinn*, 1934, P.C.I.J., Series A/B, No. 63, p. 65, at pp. 112-114.

(9) In March 1967 the Liberian oil tanker *Torrey Canyon* went aground on submerged rocks off the coast of Cornwall outside British territorial waters, spilling large amounts of oil which threatened the English coastline. After various remedial attempts had failed, the British Government decided to bomb the ship to burn the remaining oil. This operation was carried out successfully. The British Government did not advance any legal justification for its conduct, but stressed the existence of a situation of extreme danger and claimed that the decision to bomb the ship had been taken only after all other means had failed.⁴¹¹ No international protest resulted. A convention was subsequently concluded to cover future cases where intervention might prove necessary to avert serious oil pollution.⁴¹²

(10) In the *Rainbow Warrior* arbitration, the Arbitral Tribunal expressed doubt as to the existence of the excuse of necessity. It noted that the Commission's draft article "allegedly authorizes a State to take unlawful action invoking a state of necessity" and described the Commission's proposal as "controversial".⁴¹³

(11) By contrast, in the *Gabčíkovo-Nagymaros Project* case,⁴¹⁴ the International Court carefully considered an argument based on the Commission's draft article (now article 25), expressly accepting the principle while at the same time rejecting its invocation in the circumstances of that case. As to the principle itself, the International Court noted that the parties had both relied on the Commission's draft article as an appropriate formulation, and continued:

"The Court considers... that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding

⁴¹¹ *The "Torrey Canyon"*, Cmnd. 3246 (London, Her Majesty's Stationery Office, 1967).

⁴¹² International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, United Nations, *Treaty Series*, vol. 970, p. 211.

⁴¹³ *Rainbow Warrior (New Zealand/France)*, *UNRIAA*, vol. XX, p. 217 (1990), at p. 254. In *Libyan Arab Foreign Investment Company v. Republic of Burundi*, (1994), *I.L.R.*, vol. 96, p. 279 at p. 319, the tribunal declined to comment on the appropriateness of codifying the doctrine of necessity, noting that the measures taken by Burundi did not appear to have been the only means of safeguarding an essential interest against a grave and imminent peril.

⁴¹⁴ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports* 1997, p. 7.

wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words... Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met. In the present case, the following basic conditions... are relevant: it must have been occasioned by an 'essential interest' of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a 'grave and imminent peril'; the act being challenged must have been the 'only means' of safeguarding that interest; that act must not have 'seriously impair[ed] an essential interest' of the State towards which the obligation existed; and the State which is the author of that act must not have 'contributed to the occurrence of the state of necessity'. Those conditions reflect customary international law.”⁴¹⁵

(12) The plea of necessity was apparently in issue in the *Fisheries Jurisdiction* case.⁴¹⁶ Regulatory measures taken to conserve straddling stocks had been taken by the Northwest Atlantic Fisheries Organization but had, in Canada's opinion, proved ineffective for various reasons. By the Coastal Fisheries Protection Act 1994, Canada declared that the straddling stocks of the Grand Banks were “threatened with extinction”, and asserted that the purpose of the Act and regulations was “to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding”. Canadian officials subsequently boarded and seized a Spanish fishing ship, the *Estai*, on the high seas, leading to a conflict with the European Union and with Spain. The Spanish Government denied that the arrest could be justified by concerns as to conservation “since it violates the established provisions of the NAFO Convention to which Canada is a party”.⁴¹⁷ Canada disagreed, asserting that “the arrest

⁴¹⁵ Ibid., at pp. 40-41, paras. 51-52.

⁴¹⁶ *Fisheries Jurisdiction (Spain v. Canada)*, I.C.J. Reports 1998, p. 431.

⁴¹⁷ As cited in the Court's judgment: I.C.J. Reports 1998, p. 431 at p. 443, para. 20. For the EU protest of 10 March 1995, asserting that the arrest “cannot be justified by any means” see Mémoire Du Royaume d’Espagne (September 1995), para. 15.

of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen”.⁴¹⁸ The Court held that it had no jurisdiction over the case.⁴¹⁹

(13) The existence and limits of a plea of necessity have given rise to a long-standing controversy among writers. It was for the most part explicitly accepted by the early writers, subject to strict conditions.⁴²⁰ In the nineteenth century, abuses of necessity associated with the idea of “fundamental rights of States” led to a reaction against the doctrine. During the twentieth century, the number of writers opposed to the concept of state of necessity in international law increased, but the balance of doctrine has continued to favour the existence of the plea.⁴²¹

(14) On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25. The cases show that necessity has been invoked to preclude the

⁴¹⁸ I.C.J. reports 1998, p. 431 at p. 443, para. 20. See further the Canadian Counter-Memorial (February 1996), paras. 17-45.

⁴¹⁹ By an Agreed Minute between the EU and Canada, Canada undertook to repeal the regulations applying the 1994 Act to Spanish and Portuguese vessels in the NAFO area and to release the *Estai*. The parties expressly maintained their respective positions “on the conformity of the amendment of 25 May 1994 to Canada’s Coastal Fisheries Protection Act, and subsequent regulations, with customary international law and the NAFO Convention” and reserved “their ability to preserve and defend their rights in conformity with international law”. See Canada-European Community, Agreed Minute on the Conservation and Management of Fish Stocks, Brussels, 20 April 1995, *I.L.M.* (1995), vol. 34 p. 1260. See also the Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 8 September 1995, A/CONF.164/37.

⁴²⁰ See B. Ayala, *De jure et officiis bellicis et disciplina militari, libri tres* (1582, repr. Washington, Carnegie Institution, 1912), vol. II, p. 135; A. Gentili, *De iure belli, libri tres* (1612, repr. Oxford, Clarendon Press, 1933), vol. II, p. 351; H. Grotius, *De jure belli ac pacis, libri tres* (1646, repr. Oxford, Clarendon Press, 1925), vol. II, p. 193; S. Pufendorf, *De jure naturae et gentium, libri octo* (1688, repr. Oxford, Clarendon Press, 1934), vol. II, pp. 295-296; C. Wolff, *Jus gentium methodo scientifica pertractatum* (1764, repr. Oxford, Clarendon Press, 1934), vol. II, pp. 173-174; E. de Vattel, *Le droit des gens ou principes de la loi naturelle* (1758, repr. Washington, Carnegie Institution, 1916), vol. III, p. 149.

⁴²¹ For a review of the earlier doctrine, see Yearbook ... 1980, vol. II, Part One, pp. 47-49; and see also P.A. Pillitu, *Lo stato di necessita nel diritto internazionale* (Perugia, Universita di Perugia/Editrici Licosa, 1981); J. Barboza, “Necessity (Revisited) in International Law”, in J. Makarczyk (ed.), *Essays in Honour of Judge Manfred Lachs* (The Hague, Martinus Nijhoff, 1984), p. 27; R. Boed, “State of Necessity as a Justification for Internationally Wrongful Conduct”, *Yale Human Rights & Development Law Journal*, vol. 3 (2000) p. 1.

wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin.⁴²² It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population. But stringent conditions are imposed before any such plea is allowed. This is reflected in article 25. In particular, to emphasize the exceptional nature of necessity and concerns about its possible abuse, article 25 is cast in negative language (“Necessity may not be invoked... unless”).⁴²³ In this respect it mirrors the language of article 62 of the Vienna Convention on the Law of Treaties dealing with fundamental change of circumstances. It also mirrors that language in establishing, in paragraph (1), two conditions without which necessity may not be invoked and excluding, in paragraph (2), two situations entirely from the scope of the excuse of necessity.⁴²⁴

(15) The first condition, set out in subparagraph (1) (a), is that necessity may only be invoked to safeguard an essential interest from a grave and imminent peril. The extent to which a given interest is “essential” depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole. Whatever the interest may be, however, it is only when it is threatened by a grave and imminent peril that this condition is satisfied. The peril has to be objectively established and not merely apprehended as possible. In addition to being grave, the peril has to be imminent in the sense of proximate. However, as the Court in the *Gabčíkovo-Nagymaros Project* case said:

“That does not exclude ... that a ‘peril’ appearing in the long term might be held to be ‘imminent’ as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.”⁴²⁵

⁴²² Generally on the irrelevance of the source of the obligation breached, see article 12 and commentary.

⁴²³ This negative formulation was referred to by the Court in *Gabčíkovo-Nagymaros Project*, *I.C.J. Reports 1997*, p. 7, at p. 40, para. 51.

⁴²⁴ A further exclusion, common to all the circumstances precluding wrongfulness, concerns peremptory norms: see article 26 and commentary.

⁴²⁵ *I.C.J. Reports 1997*, p. 42, para. 54.

Moreover the course of action taken must be the “only way” available to safeguard that interest. The plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient. Thus in the *Gabčíkovo-Nagymaros Project* case, the Court was not convinced that the unilateral suspension and abandonment of the Project was the only course open in the circumstances, having regard in particular to the amount of work already done and the money expended on it, and the possibility of remedying any problems by other means.⁴²⁶

The word “ways” in subparagraph (1) (a) is not limited to unilateral action but may also comprise other forms of conduct available through cooperative action with other States or through international organizations (for example, conservation measures for a fishery taken through the competent regional fisheries agency). Moreover the requirement of necessity is inherent in the plea: any conduct going beyond what is strictly necessary for the purpose will not be covered.

(16) It is not sufficient for the purposes of subparagraph (1) (a) that the peril is merely apprehended or contingent. It is true that in questions relating, for example, to conservation and the environment or to the safety of large structures, there will often be issues of scientific uncertainty and different views may be taken by informed experts on whether there is a peril, how grave or imminent it is and whether the means proposed are the only ones available in the circumstances. By definition, in cases of necessity the peril will not yet have occurred. In the *Gabčíkovo-Nagymaros Project* case the Court noted that the invoking State could not be the sole judge of the necessity,⁴²⁷ but a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time.

(17) The second condition for invoking necessity, set out in subparagraph (1) (b), is that the conduct in question must not seriously impair an essential interest of the other State or States concerned, or of the international community as a whole.⁴²⁸ In other words, the interest relied on

⁴²⁶ Ibid., pp. 42-43, para. 55.

⁴²⁷ Ibid., p. 40, para. 51.

⁴²⁸ See para. (18) of the commentary, below.

must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective.⁴²⁹

(18) As a matter of terminology, it is sufficient to use the phrase “international community as a whole” rather than “international community of States as a whole”, which is used in the specific context of article 53 of the Vienna Convention on the Law of Treaties. The insertion of the words “of States” in article 53 of the Vienna Convention was intended to stress the paramountcy that States have over the making of international law, including especially the establishment of norms of a peremptory character. On the other hand the International Court used the phrase “international community as a whole” in the *Barcelona Traction* case,⁴³⁰ and it is frequently used in treaties and other international instruments in the same sense as in article 25 (1) (b).⁴³¹

(19) Over and above the conditions in article 25 (1), article 25 (2) lays down two general limits to any invocation of necessity. This is made clear by the use of the words “in any case”. subparagraph (2) (a) concerns cases where the international obligation in question explicitly or implicitly excludes reliance on necessity. Thus certain humanitarian conventions applicable to

⁴²⁹ In the *Gabčíkovo-Nagymaros Project* case the Court affirmed the need to take into account any countervailing interest of the other State concerned: *I.C.J. Reports 1997*, p. 7, at p. 46, para. 58.

⁴³⁰ *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33.

⁴³¹ See, e.g., Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, United Nations, *Treaty Series*, vol. 1035, p. 167, preambular para. 3; International Convention against the Taking of Hostages, United Nations, *Treaty Series*, vol. 1316, p. 205, preambular para. 4; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March 1988, I.M.O. Document SUA/CONF/15/Rev.1; *I.L.M.*, vol. 27 (1988), p. 665, preambular para. 5; Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, (A/RES/49/59), preambular para. 3; International Convention for the Suppression of Terrorist Bombings, 15 December 1997, A/RES/52/164, preambular para. 10; Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, preambular para. 9; International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, A/RES/54/109, opened for signature 10 January 2000, preambular para. 9.

armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.

(20) According to subparagraph (2) (b), necessity may not be relied on if the responsible State has contributed to the situation of necessity. Thus in the *Gabčíkovo-Nagymaros Project* case, the Court considered that because Hungary had “helped, by act or omission to bring” about the situation of alleged necessity, it could not now rely on that situation as a circumstance precluding wrongfulness.⁴³² For a plea of necessity to be precluded under subparagraph (2) (b), the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral. Subparagraph (2) (b) is phrased in more categorical terms than articles 23 (2) (a) and 24 (2) (a), because necessity needs to be more narrowly confined.

(20) As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of “military necessity”. It is true that in a few cases, the plea of necessity has been invoked to excuse military action abroad, in particular in the context of claims to humanitarian intervention.⁴³³ The question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law is not covered by article 25.⁴³⁴ The same thing is true of the doctrine of “military necessity” which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty

⁴³² “*I.C.J. Reports 1997*”, p. 7, at p. 46, para. 57.

⁴³³ E.g., in 1960 Belgium invoked necessity to justify its military intervention in the Congo. The matter was discussed in the Security Council but not in terms of the plea of necessity as such. See *S.C.O.R., Fifteenth Year*, 873rd meeting., 13/14 July 1960, paras. 144, 182, 192; 877th meeting., 20/21 July 1960, paras. 31 ff, 142; 878th meeting., 21 July 1960, paras. 23, 65; 879th meeting., 21/22 July 1960, paras. 80 ff, 118, 151. For the “*Caroline*” incident, see above, para. (5).

⁴³⁴ See also article 26 and commentary for the general exclusion of from the scope of circumstances precluding wrongfulness of conduct in breach of a peremptory norm.

provisions in the field of international humanitarian law.⁴³⁵ In both respects, while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.⁴³⁶

Article 26

Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Commentary

(1) In accordance with article 53 of the Vienna Convention on the Law of Treaties, a treaty which conflicts with a peremptory norm of general international law is void. Under article 64, an earlier treaty which conflicts with a new peremptory norm becomes void and terminates.⁴³⁷ The question is what implications these provisions may have for the matters dealt with in chapter V.

⁴³⁵ See e.g. art. 23 (g) of the Hague Regulations respecting the Laws and Customs of War on Land (annexed to Convention II of 1899 and Convention IV of 1907), which prohibits the destruction of enemy property “unless such destruction or seizure be imperatively demanded by the necessities of war”: J.B. Scott (ed.), *The Proceedings of the Hague Peace Conferences: the Conference of 1907* (New York, Oxford University Press, 1920) vol. I, p. 623. Similarly, art. 54 (5) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), United Nations, *Treaty Series*, vol. 1125, p. 3, appears to permit attacks on objects indispensable to the survival of the civilian population if “imperative military necessity” so requires.

⁴³⁶ See e.g., M. Huber, “Die kriegsrechtlichen Verträge und die Kriegsraison”, *Zeitschrift für Völkerrecht*, vol. VII (1913), p. 351; D. Anzilotti, *Corso di diritto internazionale* (Rome, Athenaeum, 1915), vol. III, p. 207; C. de Visscher, “Les lois de la guerre et la théorie de la nécessité”, *R.G.D.I.P.*, vol. XXIV (1917), p. 74; N.C.H. Dunbar, “Military necessity in war crimes trials”, *B.Y.I.L.*, vol. 29 (1952), p. 442; C. Greenwood, “Historical Development and Legal Basis”, in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford, Oxford University Press, 1995), p. 1 at pp. 30-33; Y. Dinstein, “Military Necessity”, in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam, North Holland, 1997), vol. III, pp. 395-397.

⁴³⁷ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331. See also art. 44 (5), which provides that in cases falling under art. 53, no separation of the provisions of the treaty is permitted.

(2) Fitzmaurice as Special Rapporteur on the Law of Treaties treated this question on the basis of an implied condition of “continued compatibility with international law”, noting that:

“A treaty obligation the observance of which is incompatible with a new rule or prohibition of international law in the nature of *jus cogens* will justify (and require) non-observance of any treaty obligation involving such incompatibility... The same principle is applicable where circumstances arise subsequent to the conclusion of a treaty, bringing into play an existing rule of international law which was not relevant to the situation as it existed at the time of the conclusion of the treaty.”⁴³⁸

The Commission did not however propose any specific articles on this question, apart from articles 53 and 64 themselves.

(3) Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The processes of interpretation and application should resolve such questions without any need to resort to the secondary rules of State responsibility. In theory one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred.⁴³⁹ Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts.

(4) It is however desirable to make it clear that the circumstances precluding wrongfulness in chapter V of Part One do not authorize or excuse any derogation from a peremptory norm of general international law. For example, a State taking countermeasures may not derogate from

⁴³⁸ Fitzmaurice, “Fourth Report on the Law of Treaties”, *Yearbook ... 1959*, vol. II, p. 46. See also S. Rosenne, *Breach of Treaty* (Cambridge, Grotius, 1985), p. 63.

⁴³⁹ For a possible analogy see the remarks of Judge ad hoc Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993*, *I.C.J. Reports 1993*, p. 325, at pp. 439-441. The Court did not address these issues in its Order.

such a norm: for example, a genocide cannot justify a counter-genocide.⁴⁴⁰ The plea of necessity likewise cannot excuse the breach of a peremptory norm. It would be possible to incorporate this principle expressly in each of the articles of chapter V, but it is both more economical and more in keeping with the overriding character of this class of norms to deal with the basic principle separately. Hence article 26 provides that nothing in chapter V can preclude the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.⁴⁴¹

(5) The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of States as a whole. So far, relatively few peremptory norms have been recognized as such. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties.⁴⁴² Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.⁴⁴³

(6) In accordance with article 26, circumstances precluding wrongfulness cannot justify or excuse a breach of a State's obligations under a peremptory rule of general international law. Article 26 does not address the prior issue whether there has been such a breach in any given

⁴⁴⁰ As the International Court noted in its decision on counterclaims in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, "in no case could one breach of the Convention serve as an excuse for another": *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-Claims*, *I.C.J. Reports 1997*, p. 243, at p. 258, para. 35.

⁴⁴¹ For convenience this limitation is spelt out again in the context of countermeasures in Part Three, chapter II. See article 50 and commentary, paras.(9) and (10).

⁴⁴² See, e.g. the decisions of the International Criminal Tribunal for the former Yugoslavia in Case IT-95-17/1-T, *Prosecutor v. Anto Furundzija*, judgment of 10 December 1998; *I.L.M.*, vol. 38 (1999), p. 317, and of the English House of Lords in *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [1999] 2 All ER 97, esp. at pp. 108-109, and 114-115 (Lord Browne-Wilkinson). Cf. *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, p. 226, at p. 257, para. 79.

⁴⁴³ Cf. *East Timor (Portugal v. Australia)*, *I.C.J. Reports 1995*, p. 90, at p. 102, para.. 29.

case. This has particular relevance to certain articles in chapter V. One State cannot dispense another from the obligation to comply with a peremptory norm, e.g. in relation to genocide or torture, whether by treaty or otherwise.⁴⁴⁴ But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility.⁴⁴⁵

Article 27

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

- (a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
- (b) The question of compensation for any material loss caused by the act in question.

Commentary

(1) Article 27 is a without prejudice clause dealing with certain incidents or consequences of invoking circumstances precluding wrongfulness under chapter V. It deals with two issues. First, it makes it clear that circumstances precluding wrongfulness do not as such affect the underlying obligation, so that if the circumstance no longer exists the obligation regains full force and effect. Second, it refers to the possibility of compensation in certain cases. Article 27 is framed as a without prejudice clause, because, as to the first point, it may be that the effect of the facts which disclose a circumstance precluding wrongfulness may also give rise to the termination of the obligation, and as to the second point, because it is not possible to specify in general terms when compensation is payable.

(2) Subparagraph (a) of article 27 addresses the question of what happens when a condition preventing compliance with an obligation no longer exists or gradually ceases to operate. It makes it clear that chapter V has a merely preclusive effect. When and to the extent that a

⁴⁴⁴ See commentary to article 45, para (4).

⁴⁴⁵ See commentary to article 20, paras. (4)-(7).

circumstance precluding wrongfulness ceases, or ceases to have its preclusive effect for any reason, the obligation in question (assuming it is still in force) will again have to be complied with, and the State whose earlier non-compliance was excused must act accordingly. The words “and to the extent” are intended to cover situations in which the conditions preventing compliance gradually lessen and allow for partial performance of the obligation.

(3) This principle was affirmed by the Tribunal in the *Rainbow Warrior* arbitration,⁴⁴⁶ and even more clearly by the International Court in the *Gabčíkovo-Nagymaros Project* case.⁴⁴⁷ In considering Hungary’s argument that the wrongfulness of its conduct in discontinuing work on the Project was precluded by a state of necessity, the Court remarked that “ [a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.”⁴⁴⁸

It may be that the particular circumstances precluding wrongfulness are, at the same time, a sufficient basis for terminating the underlying obligation. Thus a breach of a treaty justifying countermeasures may be “material” in terms of article 60 of the 1969 Vienna Convention and permit termination of the treaty by the injured State. Conversely, the obligation may be fully reinstated or its operation fully restored in principle, but modalities for resuming performance may need to be settled. These are not matters which article 27 can resolve, other than by providing that the invocation of circumstances precluding wrongfulness is without prejudice to “compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists”. Here “compliance with the obligation in question” includes cessation of the wrongful conduct.

(4) Subparagraph (b) of article 27 is a reservation as to questions of possible compensation for damage in cases covered by chapter V. Although article 27 (b) uses the term “compensation”, it is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of article 34. Rather it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected. The reference

⁴⁴⁶ *Rainbow Warrior (New Zealand/France)*, UNRIAA., vol. XX, p. 217 (1990), at pp. 251-252, para. 75.

⁴⁴⁷ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7.

⁴⁴⁸ Ibid., at p. 63, para 101; see also ibid., at p. 38, para. 47.

to “material loss” is narrower than the concept of damage elsewhere in the articles: article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V.

(5) Subparagraph (b) is a proper condition, in certain cases, for allowing a State to rely on a circumstance precluding wrongfulness. Without the possibility of such recourse the State whose conduct would otherwise be unlawful might seek to shift the burden of the defence of its own interests or concerns on to an innocent third State. This principle was accepted by Hungary in invoking the plea of necessity in the *Gabčíkovo-Nagymaros Project* case. As the Court noted, “Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.”⁴⁴⁹

(6) Subparagraph (b) does not attempt to specify in what circumstances compensation should be payable. Generally the range of possible situations covered by chapter V is such that to lay down a detailed regime for compensation is not appropriate. It will be for the State invoking a circumstance precluding wrongfulness to agree with any affected States on the possibility and extent of compensation payable in a given case.

PART TWO

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

(1) Whereas Part One of the Articles defines the general conditions necessary for State responsibility to arise, Part Two deals with the legal consequences for the responsible State. It is true that a State may face legal consequences of conduct which is internationally wrongful outside the sphere of State responsibility. For example, a material breach of a treaty may give an injured State the right to terminate or suspend the treaty in whole or in part.⁴⁵⁰ The focus of Part Two, however, is on the new legal relationship which arises upon the commission by a State of an internationally wrongful act. This constitutes the substance or content of the international responsibility of a State under the Articles.

⁴⁴⁹ Ibid., at p. 39, para. 48. A separate issue was that of accounting for accrued costs associated with the Project: *ibid.*, at p. 81, paras. 152-153.

⁴⁵⁰ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 60.

(2) Within the sphere of State responsibility, the consequences which arise by virtue of an internationally wrongful act of a State may be specifically provided for in such terms as to exclude other consequences, in whole or in part.⁴⁵¹ In the absence of any specific provision, however, international law attributes to the responsible State new obligations, and in particular the obligation to make reparation for the harmful consequences flowing from that act. The close link between the breach of an international obligation and its immediate legal consequence in the obligation of reparation was recognized in article 36 (2) of the Statute of the Permanent Court of International Justice, which was carried over without change as article 36 (2) of the Statute of the International Court. In accordance with article 36 (2), States parties to the Statute may recognize as compulsory the Court's jurisdiction, *inter alia*, in all legal disputes concerning ...

“(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation.”

Part One of the Articles sets out the general legal rules applicable to the question identified in subparagraph (c), while Part Two does the same for subparagraph (d).

(3) Part Two consists of three chapters. Chapter I sets out certain general principles and specifies more precisely the scope of Part Two. Chapter II focuses on the forms of reparation (restitution, compensation, satisfaction) and the relations between them. Chapter III deals with the special situation which arises in case of a serious breach of an obligation arising under a peremptory norm of general international law, and specifies certain legal consequences of such breaches, both for the responsible State and for other States.

Chapter I

General principles

(1) Chapter I of Part Two comprises six articles, which define in general terms the legal consequences of an internationally wrongful act of a State. Individual breaches of international law can vary across a wide spectrum from the comparatively trivial or minor up to cases which imperil the survival of communities and peoples, the territorial integrity and political independence of States and the environment of whole regions. This may be true whether the

⁴⁵¹ On the *lex specialis* principle in relation to State responsibility see article 55 and commentary.

obligations in question are owed to one other State or to some or all States or to the international community as a whole. But over and above the gravity or effects of individual cases, the rules and institutions of State responsibility are significant for the maintenance of respect for international law and for the achievement of the goals which States advance through law-making at the international level.

(2) Within chapter I, article 28 is an introductory article, affirming the principle that legal consequences are entailed whenever there is an internationally wrongful act of that State. Article 29 indicates that these consequences are without prejudice to, and do not supplant, the continued obligation of the responsible State to perform the obligation breached. This point is carried further by article 30, which deals with the obligation of cessation and assurances or guarantees of non-repetition. Article 31 sets out the general obligation of reparation for injury suffered in consequence of a breach of international law by a State. Article 32 makes clear that the responsible State may not rely on its internal law to avoid the obligations of cessation and reparation arising under Part Two. Finally, article 33 specifies the scope of the Part, both in terms of the States to which obligations are owed and also in terms of certain legal consequences which, because they accrue directly to persons or entities other than States, are not covered by Parts Two or Three of the Articles.

Article 28

Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

Commentary

(1) Article 28 serves an introductory function for Part Two and is expository in character. It links the provisions of Part One which define when the international responsibility of a State arises with the provisions of Part Two which set out the legal consequences which responsibility for an internationally wrongful act involves.

(2) The core legal consequences of an internationally wrongful act set out in Part Two are the obligations of the responsible State to cease the wrongful conduct (article 30) and to make full reparation for the injury caused by the internationally wrongful act (article 31). Where the internationally wrongful act constitutes a serious breach by the State of an obligation arising under a peremptory norm of general international law, the breach may entail further

consequences both for the responsible State and for other States. In particular, all States in such cases have obligations to cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach, and not to render aid or assistance to the responsible State in maintaining the situation so created (articles 40, 41).

(3) Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations *of* the State and not only those owed *to* other States. Thus State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State. However, while Part One applies to all the cases in which an internationally wrongful act may be committed by a State, Part Two has a more limited scope. It does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State. In other words, the provisions of Part Two are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State, and article 33 makes this clear.

Article 29

Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.

Commentary

(1) Where a State commits a breach of an international obligation, questions as to the restoration and future of the legal relationship thereby affected are central. Apart from the question of reparation, two immediate issues arise, namely, the effect of the responsible State's conduct on the obligation which has been breached, and cessation of the breach if it is continuing. The former question is dealt with by article 29, the latter by article 30.

(2) Article 29 states the general principle that the legal consequences of an internationally wrongful act do not affect the continued duty of the State to perform the obligation it has breached. As a result of the internationally wrongful act, a new set of legal relations is

established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal relation established by the primary obligation disappears. Even if the responsible State complies with its obligations under Part Two to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby of the duty to perform the obligation breached. The continuing obligation to perform an international obligation, notwithstanding a breach, underlies the concept of a continuing wrongful act (see article 14) and the obligation of cessation (see article 30 (a)).

(3) It is true that in some situations the ultimate effect of a breach of an obligation may be to put an end to the obligation itself. For example a State injured by a material breach of a bilateral treaty may elect to terminate the treaty.⁴⁵² But as the relevant provisions of the Vienna Convention on the Law of Treaties make clear, the mere fact of a breach and even of a repudiation of a treaty does not terminate the treaty.⁴⁵³ It is a matter for the injured State to react to the breach to the extent permitted by the Vienna Convention. The injured State may have no interest in terminating the treaty as distinct from calling for its continued performance. Where a treaty is duly terminated for breach, the termination does not affect legal relationships which have accrued under the treaty prior to its termination, including the obligation to make reparation for any breach.⁴⁵⁴ A breach of an obligation under general international law is even less likely to affect the underlying obligation, and indeed will never do so *as such*. By contrast the secondary legal relation of State responsibility arises on the occurrence of a breach and without any requirement of invocation by the injured State.

⁴⁵² Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 60.

⁴⁵³ Indeed in the *Gabčíkovo-Nagymaros Project* case, the Court held that continuing material breaches by both parties did not have the effect of terminating the 1977 Treaty: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports 1997*, p. 7, at p. 68, para. 114.

⁴⁵⁴ See e.g. *Rainbow Warrior (New Zealand/France)*, *UNRIAA*, vol. XX, p. 217 (1990), at p. 266, citing President McNair (dissenting) in *Ambatielos, Preliminary Objection*, *I.C.J. Reports 1952*, p. 28, at p. 63. On that particular point the Court itself agreed: *ibid.*, at p. 45. In the *Gabčíkovo-Nagymaros Project* case, Hungary accepted that the legal consequences of its termination of the 1977 Treaty on account of Czechoslovakia's breach were prospective only, and did not affect the accrued rights of either party: *I.C.J. Reports 1997*, p. 7, at pp. 73-74, paras. 125-127. The Court held that the Treaty was still in force, and therefore did not address the question.

(4) Article 29 does not need to deal with such contingencies. All it provides is that the legal consequences of an internationally wrongful act within the field of State responsibility do not affect any continuing duty to comply with the obligation which has been breached. Whether and to what extent that obligation subsists despite the breach is a matter not regulated by the law of State responsibility but by the rules concerning the relevant primary obligation.

Article 30

Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

- (a) To cease that act, if it is continuing;
- (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Commentary

(1) Article 30 deals with two separate but linked issues raised by the breach of an international obligation: the cessation of the wrongful conduct and the offer of assurances and guarantees of non-repetition by the responsible State if circumstances so require. Both are aspects of the restoration and repair of the legal relationship affected by the breach. Cessation is, as it were, the negative aspect of future performance, concerned with securing an end to continuing wrongful conduct, whereas assurances and guarantees serve a preventive function and may be described as a positive reinforcement of future performance. The continuation in force of the underlying obligation is a necessary assumption of both, since if the obligation has ceased following its breach, the question of cessation does not arise and no assurances and guarantees can be relevant.⁴⁵⁵

(2) Subparagraph (a) of article 30 deals with the obligation of the State responsible for the internationally wrongful act to cease the wrongful conduct. In accordance with article 2, the word “act” covers both acts and omissions. Cessation is thus relevant to all wrongful acts extending in time “regardless of whether the conduct of a State is an action or omission ... since there may be cessation consisting in abstaining from certain actions ...”.⁴⁵⁶

⁴⁵⁵ Cf. Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 70 (1).

⁴⁵⁶ *Rainbow Warrior*, *UNRIIAA*, vol. XX, p. 217 (1990), at p. 270, para. 113.

(3) The Tribunal in the *Rainbow Warrior* arbitration stressed “two essential conditions intimately linked” for the requirement of cessation of wrongful conduct to arise, “namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued”.⁴⁵⁷ While the obligation to cease wrongful conduct will arise most commonly in the case of a continuing wrongful act,⁴⁵⁸ article 30 also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions. The phrase “if it is continuing” at the end of subparagraph (a) of the article is intended to cover both situations.

(4) Cessation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct. With reparation, it is one of the two general consequences of an internationally wrongful act. Cessation is often the main focus of the controversy produced by conduct in breach of an international obligation.⁴⁵⁹ It is frequently demanded not only by States but also by the organs of international organizations such as the General Assembly and Security Council in the face of serious breaches of international law. By contrast reparation, important though it is in many cases, may not be the central issue in a dispute between States as to questions of responsibility.⁴⁶⁰

⁴⁵⁷ Ibid., at p. 270, para. 114.

⁴⁵⁸ For the concept of a continuing wrongful act, see commentary to article 14, paras. (3)-(11).

⁴⁵⁹ The focus of the WTO Dispute Settlement Mechanism is on cessation rather than reparation: Agreement establishing the World Trade Organization, 15 April 1994, Annex 2, Understanding on Rules and Procedures governing the Settlement of Disputes, esp. art. 3 (7), which provides for compensation “only if the immediate withdrawal of the measure is impractical and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement”. On the distinction between cessation and reparation for WTO purposes see e.g. *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, Panel Report, 21 January 2000 (WTO doc. WT/DS126/RW), para. 6.49.

⁴⁶⁰ For cases where the International Court has recognized that this may be so see, e.g., *Fisheries Jurisdiction, Merits, (Federal Republic of Germany v. Iceland)*, I.C.J. Reports 1974, p. 175, at pp. 201-205, paras. 65-76; *Gabčíkovo-Nagymaros Project*, I.C.J. Reports 1997, p. 7, at p. 81, para. 153. See further C. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), pp. 77-92.

(5) The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law.

(6) There are several reasons for treating cessation as more than simply a function of the duty to comply with the primary obligation. First, the question of cessation only arises in the event of a breach. What must then occur depends not only on the interpretation of the primary obligation but also on the secondary rules relating to remedies, and it is appropriate that they are dealt with, at least in general terms, in Articles concerning the consequences of an internationally wrongful act. Secondly, continuing wrongful acts are a common feature of cases involving State responsibility and are specifically dealt with in article 14. There is a need to spell out the consequences of such acts in Part Two.

(7) The question of cessation often arises in close connection with that of reparation, and particularly restitution. The result of cessation may be indistinguishable from restitution, for example in cases involving the freeing of hostages or the return of objects or premises seized. Nonetheless the two must be distinguished. Unlike restitution, cessation is not subject to limitations relating to proportionality.⁴⁶¹ It may give rise to a continuing obligation, even when literal return to the *status quo ante* is excluded or can only be achieved in an approximate way.

(8) The difficulty of distinguishing between cessation and restitution is illustrated by the *Rainbow Warrior* arbitration. New Zealand sought the return of the two agents to detention on the island of Hao. According to New Zealand, France was obliged to return them to and to detain them on the island for the balance of the three years; that obligation had not expired since time spent off the island was not to be counted for that purpose. The Tribunal disagreed. In its view, the obligation was for a fixed term which had expired, and there was no question of cessation.⁴⁶² Evidently the return of the two agents to the island was of no use to New Zealand if there was no continuing obligation on the part of France to keep them there. Thus a return to the *status quo ante* may be of little or no value if the obligation breached no longer exists.

⁴⁶¹ See article 35 (b) and commentary.

⁴⁶² *UNRIAA*, vol. XX, p. 217 (1990), at p. 266, para. 105.

Conversely, no option may exist for an injured State to renounce restitution if the continued performance of the obligation breached is incumbent upon the responsible State and the former State is not competent to release it from such performance. The distinction between cessation and restitution may have important consequences in terms of the obligations of the States concerned.

(9) Subparagraph (b) of article 30 deals with the obligation of the responsible State to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. Assurances and guarantees are concerned with the restoration of confidence in a continuing relationship, although they involve much more flexibility than cessation and are not required in all cases. They are most commonly sought when the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily. For example, following repeated demonstrations against the United States Embassy in Moscow in 1964-1965, President Johnson stated that ...

“The U.S. Government must insist that its diplomatic establishments and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between States. Expressions of regret and compensation are no substitute for adequate protection.”⁴⁶³

Such demands are not always expressed in terms of assurances or guarantees, but they share the characteristics of being future-looking and concerned with other potential breaches. They focus on prevention rather than reparation and they are included in article 30.

(10) The question whether the obligation to offer assurances or guarantees of non-repetition may be a legal consequence of an internationally wrongful act was debated in the *LaGrand* case.⁴⁶⁴ This concerned an admitted failure of consular notification contrary to article 36 of the Vienna Convention on Consular Relations of 1963. In its fourth submission Germany sought both general and specific assurances and guarantees as to the means of future compliance with the Convention. The United States argued that to give such assurances or guarantees went beyond the scope of the obligations in the Convention and that the Court lacked jurisdiction to require them. In any event, formal assurances and guarantees were unprecedented and should

⁴⁶³ Reprinted in *I.L.M.*, vol. IV (1965), p. 698.

⁴⁶⁴ *LaGrand (Germany v. United States of America)*, *Merits*, judgment of 27 June 2001.

not be required. Germany's entitlement to a remedy did not extend beyond an apology, which the United States had given. Alternatively no assurances or guarantees were appropriate in light of the extensive action it had taken to ensure that federal and State officials would in future comply with the Convention. On the question of jurisdiction the Court held ...

“that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation. Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.”⁴⁶⁵

On the question of appropriateness, the Court noted that an apology would not be sufficient in any case in which a foreign national had been “subjected to prolonged detention or sentenced to severe penalties” following a failure of consular notification.⁴⁶⁶ But in the light of information provided by the United States as to the steps taken to comply in future, the Court held ...

“that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), must be regarded as meeting Germany's request for a general assurance of non-repetition.”⁴⁶⁷

As to the specific assurances sought by Germany, the Court limited itself to stating that ...

“... if the United States, notwithstanding its commitment referred to ... should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a

⁴⁶⁵ Ibid., para. 48, citing *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, p. 22.

⁴⁶⁶ *LaGrand, Merits*, judgment of 27 June 2001, para. 123.

⁴⁶⁷ Ibid., para. 124; see also the *dispositif*, para. 128 (6).

conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.”⁴⁶⁸

The Court thus upheld its jurisdiction on Germany’s fourth submission and responded to it in the *dispositif*. It did not, however, discuss the legal basis for assurances of non-repetition.

(11) Assurances or guarantees of non-repetition may be sought by way of satisfaction (e.g., the repeal of the legislation which allowed the breach to occur), and there is thus some overlap between the two in practice.⁴⁶⁹ However they are better treated as an aspect of the continuation and repair of the legal relationship affected by the breach. Where assurances and guarantees of non-repetition are sought by an injured State, the question is essentially the reinforcement of a continuing legal relationship and the focus is on the future, not the past. In addition, assurances and guarantees of non-repetition may be sought by a State other than an injured State in accordance with article 48.

(12) Assurances are normally given verbally, while guarantees of non-repetition involve something more - for example, preventive measures to be taken by the responsible State designed to avoid repetition of the breach. With regard to the kind of guarantees that may be requested international practice is not uniform. The injured State usually demands either safeguards against the repetition of the wrongful act without any specification of the form they are to take⁴⁷⁰ or, when the wrongful act affects its nationals, assurances of better protection of persons and property.⁴⁷¹ In the *LaGrand* case, the Court spelled out with some specificity the obligation that would arise for the United States from a future breach, but added that “[t]his obligation can be carried out in various ways. The choice of means must be left to the

⁴⁶⁸ Ibid., para. 125. See also *ibid.*, para. 127, and the *dispositif*, para. 128 (7).

⁴⁶⁹ See commentary to article 36, para. (5).

⁴⁷⁰ In the “Dogger Bank” incident in 1904, the United Kingdom sought “security against the recurrence of such intolerable incidents”: Martens, *Nouveau Recueil*, 2nd series, vol. XXXIII, p. 642. See also the exchange of notes between China and Indonesia following the attack in March 1966 against the Chinese Consulate General at Jakarta, in which the Chinese Deputy Minister for Foreign Affairs sought a guarantee that such incidents would not be repeated in the future: *R.G.D.I.P.*, vol. 70 (1966), p. 1013.

⁴⁷¹ Such assurances were given in the “Doane” incident (1886): Moore, *Digest*, vol. VI, pp. 345-346.

United States”.⁴⁷² It noted further that a State may not be in a position to offer a firm guarantee of non-repetition.⁴⁷³ Whether it could properly do so would depend on the nature of the obligation in question.

(13) In some cases, the injured State may ask the responsible State to adopt specific measures or to act in a specified way in order to avoid repetition. Sometimes the injured State merely seeks assurances from the responsible State that, in future, it will respect the rights of the injured State.⁴⁷⁴ In other cases, the injured State requires specific instructions to be given,⁴⁷⁵ or other specific conduct to be taken.⁴⁷⁶ But assurances and guarantees of non-repetition will not always be appropriate, even if demanded. Much will depend on the circumstances of the case, including the nature of the obligation and of the breach. The rather exceptional character of the measures is indicated by the words “if the circumstances so require” at the end of subparagraph (b). The obligation of the responsible State with respect to assurances and guarantees of non-repetition is formulated in flexible terms in order to prevent the kinds of abusive or excessive claims which characterized some demands for assurances and guarantees by States in the past.

⁴⁷² *LaGrand, Merits*, judgment of 27 June 2001, para. 125.

⁴⁷³ *Ibid.*, para. 124.

⁴⁷⁴ See e.g. the 1901 case in which the Ottoman Empire gave a formal assurance that the British, Austrian and French postal services would henceforth operate freely in its territory: *R.G.D.I.P.*, vol. 8 (1901), p. 777, at pp. 788, 792.

⁴⁷⁵ See e.g. the incidents involving *The “Herzog”* and *The “Bundesrath”*, two German ships seized by the British Navy in December 1899 and January 1900, during the Boer war, in which Germany drew the attention of Great Britain to “the necessity for issuing instructions to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war”: Martens, *Nouveau Recueil*, 2nd series, vol. XXIX, pp. 456, 486.

⁴⁷⁶ In the *Trail Smelter* case, the arbitral tribunal specified measures to be adopted by the Trail Smelter, including measures designed to “prevent future significant fumigations in the United States”: *Trail Smelter (United States of America/Canada)*, *UNRIAA*, vol. III, p. 1905 (1938, 1941), at p. 1934. Requests to modify or repeal legislation are frequently made by international bodies. See, e.g., the decisions of the Human Rights Committee: *Torres Ramirez v. Uruguay*, decision of 23 July 1980, para. 19, A/35/40, p. 126; *Lanza v. Uruguay*, decision of 3 April 1980, *ibid.* p. 111, at p. 119, para. 17; *Dermitt Barbato v. Uruguay*, decision of 21 October 1982, A/38/40, p. 133, para. 11.

Article 31

Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Commentary

(1) The obligation to make full reparation is the second general obligation of the responsible State consequent upon the commission of an internationally wrongful act. The general principle of the consequences of the commission of an internationally wrongful act was stated by the Permanent Court in the *Factory at Chorzów* case:

“It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.”⁴⁷⁷

In this passage, which has been cited and applied on many occasions,⁴⁷⁸ the Court was using the term “reparation” in its most general sense. It was rejecting a Polish argument that jurisdiction to interpret and apply a treaty did not entail jurisdiction to deal with disputes over the form and quantum of reparation to be made. By that stage of the dispute, Germany was no longer seeking for its national the return of the factory in question or of the property seized with it.

(2) In a subsequent phase of the same case, the Court went on to specify in more detail the content of the obligation of reparation. It said:

“The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all

⁴⁷⁷ *Factory at Chorzów*, Jurisdiction, 1927, P.C.I.J., Series A, No. 9, p. 21.

⁴⁷⁸ Cf. the International Court’s reference to this decision in *LaGrand (Germany v. United States of America)*, *Merits*, judgment of 27 June 2001, para. 48.

probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”⁴⁷⁹

In the first sentence, the Court gave a general definition of reparation, emphasizing that its function was the re-establishment of the situation affected by the breach.⁴⁸⁰ In the second sentence it dealt with that aspect of reparation encompassed by “compensation” for an unlawful act - that is, restitution or its value, and in addition damages for loss sustained as a result of the wrongful act.

(3) The obligation placed on the responsible State by article 31 is to make “full reparation” in the *Factory at Chorzów* sense. In other words, the responsible State must endeavour to “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”⁴⁸¹ through the provision of one or more of the forms of reparation set out in chapter II of this Part.

(4) The general obligation of reparation is formulated in article 31 as the immediate corollary of a State’s responsibility, i.e., as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States. This formulation avoids the difficulties that might arise where the same obligation is owed simultaneously to several, many or all States, only a few of which are specially affected by the breach. But quite apart from the questions raised when there is more than one State entitled to invoke responsibility,⁴⁸² the general obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any State, even if the form which reparation should take in the circumstances may depend on the response of the injured State or States.

⁴⁷⁹ *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17, p. 47.*

⁴⁸⁰ Cf. P-M. Dupuy, “Le fait générateur de la responsabilité internationale des États”, *Recueil des cours*, vol. 188 (1984-V), p. 9, at p. 94, who uses the term “restauration”.

⁴⁸¹ *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17, p. 47.*

⁴⁸² For the States entitled to invoke responsibility see articles 42 and 48 and commentaries. For the situation where there is a plurality of injured States see article 46 and commentary.

(5) The responsible State's obligation to make full reparation relates to the "injury caused by the internationally wrongful act". The notion of "injury", defined in paragraph 2, is to be understood as including any damage caused by that act. In particular, in accordance with paragraph 2, "injury" includes any material or moral damage caused thereby. This formulation is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, excluding merely abstract concerns or general interests of a State which is individually unaffected by the breach.⁴⁸³ "Material" damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. "Moral" damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life. Questions of reparation for such forms of damage are dealt with in more detail in chapter II of this Part.⁴⁸⁴

(6) The question whether damage to a protected interest is a necessary element of an internationally wrongful act has already been discussed.⁴⁸⁵ There is in general no such requirement; rather this is a matter which is determined by the relevant primary rule. In some cases, the gist of a wrong is the causing of actual harm to another State. In some cases what matters is the failure to take necessary precautions to prevent harm even if in the event no harm occurs. In some cases there is an outright commitment to perform a specified act, e.g. to incorporate uniform rules into internal law. In each case the primary obligation will determine what is required. Hence article 12 defines a breach of an international obligation as a failure to conform with an obligation.

⁴⁸³ Although not individually injured, such States may be entitled to invoke responsibility in respect of breaches of certain classes of obligation in the general interest, pursuant to article 48. Generally on notions of injury and damage see B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973); B. Graefrath, "Responsibility and damage caused: relations between responsibility and damages", *Recueil des cours*, vol. 185 (1984-II), p. 95; A. Tanzi, "Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?", in M. Spinedi & B. Simma (eds), *United Nations Codification of State Responsibility* (New York, Oceana, 1987) p. 1; I. Brownlie, *System of the Law of Nations: State Responsibility (Part I)* (Oxford, Clarendon Press, 1983), pp. 53-88.

⁴⁸⁴ See especially article 36 and commentary.

⁴⁸⁵ See commentary to article 2, para. (9).

(7) As a corollary there is no general requirement, over and above any requirements laid down by the relevant primary obligation, that a State should have suffered material harm or damage before it can seek reparation for a breach. The existence of actual damage will be highly relevant to the form and quantum of reparation. But there is no general requirement of material harm or damage for a State to be entitled to seek some form of reparation. In the *Rainbow Warrior* arbitration it was initially argued that “in the theory of international responsibility, damage is necessary to provide a basis for liability to make reparation”, but the parties subsequently agreed that ...

“[u]nlawful action against non-material interests, such as acts affecting the honour, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State.”⁴⁸⁶

The Tribunal held that the breach by France had “provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage... of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well”.⁴⁸⁷

(8) Where two States have agreed to engage in particular conduct, the failure by one State to perform the obligation necessarily concerns the other. A promise has been broken and the right of the other State to performance correspondingly infringed. For the secondary rules of State responsibility to intervene at this stage and to prescribe that there is no responsibility because no identifiable harm or damage has occurred would be unwarranted. If the parties had wished to commit themselves to that formulation of the obligation they could have done so. In many cases the damage that may follow from a breach (e.g. harm to a fishery from fishing in the closed season, harm to the environment by emissions exceeding the prescribed limit, abstraction from a river of more than the permitted amount) may be distant, contingent or uncertain. Nonetheless States may enter into immediate and unconditional commitments in their mutual long-term interest in such fields. Accordingly article 31 defines “injury” in a broad and inclusive way, leaving it to the primary obligations to specify what is required in each case.

⁴⁸⁶ *Rainbow Warrior (New Zealand/France)*, UNRIIAA, vol. XX, p. 217 (1990), at p. 267, para. 109.

⁴⁸⁷ *Ibid.*, at p. 267, para. 110.

(9) Paragraph 2 addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury. It is only “[i]njury ... caused by the internationally wrongful act of a State” for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.

(10) The allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses “attributable [to the wrongful act] as a proximate cause”,⁴⁸⁸ or to damage which is “too indirect, remote, and uncertain to be appraised”,⁴⁸⁹ or to “any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of” the wrongful act.⁴⁹⁰ Thus causality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too “remote” or “consequential” to be the subject of reparation. In some cases, the criterion of “directness” may

⁴⁸⁸ See United States-Germany Mixed Claims Commission, *Administrative Decision No. II*, *UNRIAA*, vol. VII, p. 23 (1923), at p. 30. See also *Dix*, *ibid*, vol. IX, p. 119 (1902), at p. 121, and the Canadian statement of claim following the disintegration of the *Cosmos 954* Soviet nuclear-powered satellite over its territory in 1978: *I.L.M.*, vol. 18 (1979), p. 907, para. 23.

⁴⁸⁹ See the *Trail Smelter* arbitration, *UNRIAA*, vol. III, p. 1905 (1938, 1941), at p. 1931. See also A. Hauriou, “Les dommages indirects dans les arbitrages internationaux”, *R.G.D.I.P.*, vol. 31 (1924), p. 209 citing the “*Alabama*” arbitration as the most striking application of the rule excluding “indirect” damage.

⁴⁹⁰ Security Council resolution 687 (1991), para. 16. This was a chapter VII resolution, but it is expressed to reflect Iraq’s liability “under international law ... as a result of its unlawful invasion and occupation of Kuwait”. The United Nations Compensation Commission and the Governing Council have provided some guidance on the interpretation of the requirements of directness and causation under para. 16. See e.g. *Claims Against Iraq (Category “B” Claims)*, Report of 14 April 1994 (S/AC.26/1994/1), reproduced in *I.L.R.*, vol. 109, p. 127; approved by Governing Council Decision 20, 26 May 1994 (S/AC.26/Dec.20), reproduced in *I.L.R.*, vol. 109, p. 622; *Well Blowout Control Claim*, Report of 15 November 1996 (S/AC.26/1996/5), reproduced in *I.L.R.*, vol. 109, p. 480, at pp. 506-511, paras. 66-86; approved by Governing Council Decision 40, 17 December 1996 (S/AC.26/Dec.40), reproduced in *I.L.R.*, vol. 109, p. 669.

be used,⁴⁹¹ in others “foreseeability”⁴⁹² or “proximity”.⁴⁹³ But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.⁴⁹⁴ In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage “is not a part of the law which can be satisfactorily solved by search for a single verbal formula”.⁴⁹⁵ The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.

(11) A further element affecting the scope of reparation is the question of mitigation of damage. Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a “duty to mitigate”, this is

⁴⁹¹ As in Security Council resolution 687 (1991), para. 16.

⁴⁹² See, e.g., the “*Naulilaa*” case (*Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa*) (*Portugal v. Germany*), *UNRIIAA*, vol. II, p. 1011 (1928), at p. 1031.

⁴⁹³ For comparative reviews of issues of causation and remoteness see, e.g. H.L.A. Hart & A. M. Honoré, *Causation in the Law* (2nd ed.) (Oxford, Clarendon Press, 1985); A. M. Honoré, “Causation and Remoteness of Damage”, A. Tunc, ed. In *International Encyclopedia of Comparative Law* vol. XI, Part 1, chap. VII, 156 p.; K. Zweigert and H. Kötz, *Introduction to Comparative Law* (3rd ed) (trans. J.A. Weir) (Oxford, Clarendon Press, 1998), pp. 601-627 (esp. p. 609ff.); B. S. Markesinis, *The German Law of Obligations. Volume II. The Law of Torts: A Comparative Introduction* (Oxford, Clarendon Press, 3rd ed., 1997), pp. 95-108, with many references to the literature.

⁴⁹⁴ See e.g. the decision of the Iran-United States Claims Tribunal in *Islamic Republic of Iran v. United States of America*, *Cases Nos. A15 (IV) and A24*, Award No. 590-A15 (IV)/A24-FT, 28 December 1998.

⁴⁹⁵ P. S. Atiyah, *An Introduction to the Law of Contract* (5th ed.) (Oxford, Clarendon Press, 1995), p. 466.

not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.⁴⁹⁶ The point was clearly made in this sense by the International Court in the *Gabčíkovo-Nagymaros Project* case:

“Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that ‘It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained.’ It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided.

While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.”⁴⁹⁷

(12) Often two separate factors combine to cause damage. In the *Diplomatic and Consular Staff* case,⁴⁹⁸ the initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students’ own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy. In the *Corfu Channel* case,⁴⁹⁹ the damage to the British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international

⁴⁹⁶ In the *Well Blowout Control Claim*, a Panel of the United Nations Compensation Commission noted that “under the general principles of international law relating to mitigation of damages ... the Claimant was not only permitted but indeed obligated to take reasonable steps to ... mitigate the loss, damage or injury being caused”: Report of 15 November 1996 (S/AC.26/1994/5), reproduced in *I.L.R.*, vol. 109, p. 480, at pp. 502-503, para. 54.

⁴⁹⁷ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports* 1997, p. 7, at p. 55, para. 80.

⁴⁹⁸ *United States Diplomatic and Consular Staff in Tehran*, *I.C.J. Reports* 1980, p. 3, at pp. 29-32.

⁴⁹⁹ *Corfu Channel, Merits*, *I.C.J. Reports* 1949, p. 4, at pp. 17-18, 22-23.

practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes,⁵⁰⁰ except in cases of contributory fault.⁵⁰¹ In the *Corfu Channel* case, for example, the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of the mines even though Albania had not itself laid the mines.⁵⁰² Such a result should follow a fortiori in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood. In the *Diplomatic and Consular Staff* case the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them.⁵⁰³

(13) It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful

⁵⁰⁰ This approach is consistent with the way in which these issues are generally dealt with in national law. "It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause ... In other words, the liability of a tortfeasor is not affected vis-à-vis the victim by the consideration that another is concurrently liable": J.A. Weir, "Complex Liabilities", in A. Tunc, (ed.), *International Encyclopedia of Comparative Law* (Tübingen, Mohr, 1983), vol. XI, p. 41. The United States relied on this comparative law experience in its pleadings in the *Aerial Incident Cases* (*United States of America v. Bulgaria*) when it said, referring to articles 38 (1) (c) and (d) of the Statute, that "in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage". Memorial of 2 December 1958, in *I.C.J. Pleadings, Aerial Incident of 27 July 1955*, at p. 229.

⁵⁰¹ See article 39 and commentary.

⁵⁰² See *Corfu Channel (Assessment of the Amount of Compensation)*, *I.C.J. Reports* 1949, p. 244, at p. 250.

⁵⁰³ *I.C.J. Reports*, 1980, p. 3 at pp. 31-33.

conduct. Indeed, in the *Zafiro* claim the tribunal went further and in effect placed the onus on the responsible State to show what proportion of the damage was *not* attributable to its conduct. It said:

“We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers cannot be identified, we are constrained to hold the United States liable for the whole. In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.”⁵⁰⁴

(14) Concerns are sometimes expressed that a general principle of reparation of all loss flowing from a breach might lead to reparation which is out of all proportion to the gravity of the breach. However the notion of “proportionality” applies differently to the different forms of reparation.⁵⁰⁵ It is addressed, as appropriate, in the individual articles in chapter II dealing with the forms of reparation.

Article 32

Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Commentary

(1) Article 3 concerns the role of internal law in the characterization of an act as wrongful. Article 32 makes clear the irrelevance of a State’s internal law to compliance with the obligations of cessation and reparation. It provides that a State which has committed an internationally wrongful act may not invoke its internal law as a justification for failure to comply with its obligations under this Part. Between them, articles 3 and 32 give effect for the

⁵⁰⁴ “*The Zafiro*”, *UNRIAA*, vol. VI, p. 160 (1925), at pp. 164-165.

⁵⁰⁵ See articles 35 (b), 37 (3), 39 and commentaries thereto.

purposes of State responsibility to the general principle that a State may not rely on its internal law as a justification for its failure to comply with its international obligations.⁵⁰⁶ Although practical difficulties may arise for a State organ confronted with an obstacle to compliance posed by the rules of the internal legal system under which it is bound to operate, the State is not entitled to oppose its internal law or practice as a legal barrier to the fulfilment of an international obligation arising under Part Two.

(2) Article 32 is modelled on article 27 of the 1969 Vienna Convention on the Law of Treaties,⁵⁰⁷ which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This general principle is equally applicable to the international obligations deriving from the rules of State responsibility set out in Part Two. The principle may be qualified by the relevant primary rule, or by a *lex specialis*, such as article 41 of the European Convention on Human Rights, which provides for just satisfaction in lieu of full reparation “if the internal law of the said Party allows only partial reparation to be made”.⁵⁰⁸

(3) The principle that a responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations arising out of the commission of an internationally wrongful act is supported both by State practice and international decisions. For example the dispute between Japan and the United States in 1906 over California’s discriminatory education policies was resolved by the revision of the Californian legislation.⁵⁰⁹ In the incident concerning article 61 (2) of the Weimar Constitution, a constitutional amendment was provided for in order to ensure the discharge of the obligation deriving from article 80 of the Treaty of Versailles.⁵¹⁰ In the *Peter Pázmány University* case the Permanent Court specified that

⁵⁰⁶ See commentary to article 3, paras. (2)-(4).

⁵⁰⁷ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

⁵⁰⁸ United Nations, *Treaty Series*, vol. 213, p. 221, as renumbered by the Eleventh Protocol, 1994. Other examples include art. 32 of the Revised General Act for the Pacific Settlement of Disputes of 23 April 1949, United Nations, *Treaty Series*, vol. 72, p. 101, and art. 30 of the 1957 European Convention for the Peaceful Settlement of Disputes, United Nations, *Treaty Series*, vol. 320, p. 243.

⁵⁰⁹ See R.L. Buell “The development of the anti-Japanese agitation in the United States”, *Political Science Quarterly*, vol. 37 (1922), 620.

⁵¹⁰ *British and Foreign State Papers*, vol. 112, p. 1094.

the property to be returned should be “freed from any measure of transfer, compulsory administration, or sequestration”.⁵¹¹ In short, international law does not recognize that the obligations of a responsible State under Part Two are subject to the State’s internal legal system nor does it allow internal law to count as an excuse for non-performance of the obligations of cessation and reparation.

Article 33

Scope of international obligations set out in this Part

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

Commentary

- (1) Article 33 concludes the provisions of chapter I of Part Two by clarifying the scope and effect of the international obligations covered by the Part. In particular paragraph 1 makes it clear that identifying the State or States towards which the responsible State’s obligations in Part Two exist depends both on the primary rule establishing the obligation that was breached and on the circumstances of the breach. For example, pollution of the sea, if it is massive and widespread, may affect the international community as a whole or the coastal States of a region; in other circumstances it might only affect a single neighbouring State. Evidently the gravity of the breach may also affect the scope of the obligations of cessation and reparation.
- (2) In accordance with paragraph 1, the responsible State’s obligations in a given case may exist towards another State, several States or the international community as a whole. The reference to several States includes the case in which a breach affects all the other parties to a treaty or to a legal regime established under customary international law. For instance, when an obligation can be defined as an “integral” obligation, the breach by a State necessarily affects all the other parties to the treaty.⁵¹²

⁵¹¹ *Appeal from a judgement of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University)*, 1933, *P.C.I.J.*, *Series A/B*, No. 61, p. 208, at p. 249.

⁵¹² See further article 42 (b) (ii) and commentary.

- (3) When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights. Individual rights under international law may also arise outside the framework of human rights.⁵¹³ The range of possibilities is demonstrated from the judgment of the International Court in the *LaGrand* case,⁵¹⁴ where the Court held that article 36 of the Vienna Convention on Consular Relations "creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person".⁵¹⁵
- (4) Such possibilities underlie the need for paragraph 2 of article 33. Part Two deals with the secondary obligations of States in relation to cessation and reparation, and those obligations may be owed, *inter alia*, to one or several States or to the international community as a whole. In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected. It is also true in the case of rights under bilateral or regional investment protection agreements. Part Three is concerned with the invocation of responsibility by other States, whether they are to be considered "injured States" under article 42, or other interested States under article 48, or whether they may be exercising specific rights to invoke responsibility under some special rule (cf. article 55). The Articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than

⁵¹³ Cf. *Jurisdiction of the Courts of Danzig, 1928, P.C.I.J., Series B, No. 15*, pp. 17-21.

⁵¹⁴ *LaGrand (Germany v. United States of America), Merits*, judgment of 27 June 2001.

⁵¹⁵ *Ibid.*, para. 77. In the circumstances the Court did not find it necessary to decide whether the individual rights had "assumed the character of a human right": *ibid.*, para. 78.

States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase “which may accrue directly to any person or entity other than a State”.

Chapter II

Reparation for injury

Chapter II deals with the forms of reparation for injury, spelling out in further detail the general principle stated in article 31, and in particular seeking to establish more clearly the relations between the different forms of reparation, viz., restitution, compensation and satisfaction, as well as the role of interest and the question of taking into account any contribution to the injury which may have been made by the victim.

Article 34

Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Commentary

(1) Article 34 introduces chapter II by setting out the forms of reparation which separately or in combination will discharge the obligation to make full reparation for the injury caused by the internationally wrongful act. Since the notion of “injury” and the necessary causal link between the wrongful act and the injury are defined in the statement of the general obligation to make full reparation in article 31,⁵¹⁶ article 34 need do no more than refer to “[f]ull reparation for the injury caused”.

(2) In the *Factory at Chorzów* case, the injury was a material one and the Permanent Court dealt only with two forms of reparation, restitution and compensation.⁵¹⁷ In certain cases, satisfaction may be called for as an additional form of reparation. Thus full reparation may take the form of restitution, compensation and satisfaction, as required by the circumstances. Article 34 also makes it clear that full reparation may only be achieved in particular cases by the combination of different forms of reparation. For example, re-establishment of the situation

⁵¹⁶ See commentary to article 31, paras. (4)-(14).

⁵¹⁷ *Factory at Chorzów, Merits, 1928, P.C.I.J. Series A, No. 17*, p. 47.

which existed before the breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (e.g., injury flowing from the loss of the use of property wrongfully seized). Wiping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused.

(3) The primary obligation breached may also play an important role with respect to the form and extent of reparation. In particular, in cases of restitution not involving the return of persons, property or territory of the injured State, the notion of reverting to the *status quo ante* has to be applied having regard to the respective rights and competences of the States concerned. This may be the case, for example, where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed.⁵¹⁸

(4) The provision of each of the forms of reparation described in article 34 is subject to the conditions laid down in the articles which follow it in chapter II. This limitation is indicated by the phrase “in accordance with the provisions of this chapter”. It may also be affected by any valid election that may be made by the injured State as between different forms of reparation. For example, in most circumstances the injured State is entitled to elect to receive compensation rather than restitution. This element of choice is reflected in article 43.

(5) Concerns have sometimes been expressed that the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible State is concerned. The issue is whether the principle of proportionality should be articulated as an aspect of the obligation to make full reparation. In these Articles, proportionality is addressed in the context of each form of reparation, taking into account its specific character. Thus restitution is excluded if it would involve a burden out of all proportion to the benefit gained by the injured State or other party.⁵¹⁹ Compensation is limited to damage actually suffered as a result of the

⁵¹⁸ Thus in the *LaGrand* case, the Court indicated that a breach of the notification requirement in art. 36 of the Vienna Convention on Consular Relations, United Nations, *Treaty Series*, vol. 596, p. 261, leading to a severe penalty or prolonged detention, would require reconsideration of the fairness of the conviction “by taking account of the violation of the rights set forth in the Convention”: *LaGrand (Germany v. United States of America)*, *Merits*, judgment of 27 June 2001, para. 125. This would be a form of restitution which took into account the limited character of the rights in issue.

⁵¹⁹ See article 35 (b) and commentary.

internationally wrongful act, and excludes damage which is indirect or remote.⁵²⁰ Satisfaction must “not be out of proportion to the injury”.⁵²¹ Thus each of the forms of reparation takes such considerations into account.

(6) The forms of reparation dealt with in chapter II represent ways of giving effect to the underlying obligation of reparation set out in article 31. There are not, as it were, separate secondary obligations of restitution, compensation and satisfaction. Some flexibility is shown in practice in terms of the appropriateness of requiring one form of reparation rather than another, subject to the requirement of full reparation for the breach in accordance with article 31.⁵²² To the extent that one form of reparation is dispensed with or is unavailable in the circumstances, others, especially compensation, will be correspondingly more important.

Article 35

Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) Is not materially impossible;

(b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Commentary

(1) In accordance with article 34, restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act. Restitution involves the re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act, to the extent that any changes that have occurred in that situation may be traced to

⁵²⁰ See article 31 and commentary.

⁵²¹ See article 37 (3) and commentary.

⁵²² E.g., *Mélanie Lachenal*, *UNRIAA*, vol. XIII, p. 116 (1954), at pp. 130-131, where compensation was accepted in lieu of restitution originally decided upon, the Franco-Italian Conciliation Commission having agreed that restitution would require difficult internal procedures. See also commentary to article 35, para. (4).

that act. In its simplest form, this involves such conduct as the release of persons wrongly detained or the return of property wrongly seized. In other cases, restitution may be a more complex act.

(2) The concept of restitution is not uniformly defined. According to one definition, restitution consists in re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act. Under another definition, restitution is the establishment or re-establishment of the situation that would have existed if the wrongful act had not been committed. The former definition is the narrower one; it does not extend to the compensation which may be due to the injured party for loss suffered, for example for loss of the use of goods wrongfully detained but subsequently returned. The latter definition absorbs into the concept of restitution other elements of full reparation and tends to conflate restitution as a form of reparation and the underlying obligation of reparation itself. Article 35 adopts the narrower definition which has the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed. Restitution in this narrow sense may of course have to be completed by compensation in order to ensure full reparation for the damage caused, as article 36 makes clear.

(3) Nonetheless, because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by the Permanent Court in the *Factory at Chorzów* case when it said that the responsible State was under “the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible”.⁵²³ The Court went on to add that “[t]he impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution”.⁵²⁴ It can be seen in

⁵²³ *Factory at Chorzów, Merits, 1928, P.C.I.J. Series A, No. 17*, p. 48.

⁵²⁴ *Ibid.*

operation in the cases where tribunals have considered compensation only after concluding that, for one reason or another, restitution could not be effected.⁵²⁵ Despite the difficulties restitution may encounter in practice, States have often insisted upon claiming it in preference to compensation. Indeed in certain cases, especially those involving the application of peremptory norms, restitution may be required as an aspect of compliance with the primary obligation.

(4) On the other hand there are often situations where restitution is not available or where its value to the injured State is so reduced that other forms of reparation take priority. Questions of election as between different forms of reparation are dealt with in the context of Part Three.⁵²⁶ But quite apart from valid election by the injured State or other entity, the possibility of restitution may be practically excluded, e.g. because the property in question has been destroyed or fundamentally changed in character or the situation cannot be restored to the *status quo ante* for some reason. Indeed in some cases tribunals have inferred from the terms of the *compromis* or the positions of the parties what amounts to a discretion to award compensation rather than restitution. For example, in the *Walter Fletcher Smith* case, the arbitrator, while maintaining that restitution should be appropriate in principle, interpreted the *compromis* as giving him a discretion to award compensation and did so in “the best interests of the parties, and of the public”.⁵²⁷ In the *Aminoil* arbitration, the parties agreed that restoration of the *status quo ante* following the annulment of the concession by the Kuwaiti decree would be impracticable.⁵²⁸

⁵²⁵ See, e.g., *British Claims in the Spanish Zone of Morocco*, *UNRIAA*, vol. II, p. 615 (1925), at pp. 621-625, 651-742; *Religious Property Expropriated by Portugal*, *ibid.*, vol. I, p. 7 (1920); *Walter Fletcher Smith*, *ibid.*, vol. II, p. 913 (1927), at p. 918; *Heirs of Lebas de Courmont*, *ibid.*, vol. XIII, p. 761 (1957), at p. 764.

⁵²⁶ See articles 43, 45 and commentaries.

⁵²⁷ *UNRIAA*, vol. II, p. 915 (1929), at p. 918. In the *Greek Telephone Company* case, the arbitral tribunal, while ordering restitution, asserted that the responsible State could provide compensation instead for “important State reasons”. See J.G. Welter and S.M. Schwebel, “Some little known cases on concessions”, *B.Y.I.L.*, vol. 40 (1964), p. 216, at p. 221.

⁵²⁸ *Government of Kuwait v. American Independent Oil Company*, (1982) *I.L.R.*, vol. 66, p. 529, at p. 533.

(5) Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them. Examples of material restitution include the release of detained individuals, the handing over to a State of an individual arrested in its territory,⁵²⁹ the restitution of ships,⁵³⁰ or other types of property⁵³¹ including documents, works of art, share certificates, etc.⁵³² The term “juridical restitution” is sometimes used where restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law,⁵³³ the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner⁵³⁴ or a requirement that steps be taken (to the extent allowed by international law) for the termination of a treaty.⁵³⁵ In some cases, both material and juridical restitution may be

⁵²⁹ Examples of material restitution involving persons include the “*Trent*” (1861) and “*Florida*” (1864) incidents, both involving the arrest of individuals on board ships: Moore, *Digest*, vol. VII, pp. 768, 1090-1091), and the *Diplomatic and Consular Staff* case in which the International Court ordered Iran to immediately release every detained United States national: *Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at pp. 44-45.

⁵³⁰ See e.g. the “*Giaffarieh*” incident (1886) which originated in the capture in the Red Sea by an Egyptian warship of four merchant ships from Massawa under Italian registry: Società Italiana per l’Organizzazione Internazionale, Consiglio Nazionale delle Ricerche, *La prassi italiana di diritto internazionale*, 1st series (Dobbs Ferry, Oceana, 1970), vol. II, pp. 901-902.

⁵³¹ E.g., *Temple of Preah Vihear, Merits, I.C.J. Reports 1962*, p. 6, at pp. 36-37, where the International Court decided in favour of a Cambodian claim which included restitution of certain objects removed from the area and the temple by Thai authorities. See also the *Hôtel Métropole* case, *UNRIAA*, vol. XIII, p. 219 (1950), the *Ottoz* case, *ibid.*, vol. XIII, p. 240 (1950), the *Hénon* case, *ibid.*, vol. XIII, p. 249 (1951).

⁵³² In the *Buzau-Nehoiasi Railway* case, an arbitral tribunal provided for the restitution to a German company of shares in a Romanian railway company: *UNRIAA*, vol. III, p. 1839 (1939).

⁵³³ For cases where the existence of a law itself amounts to a breach of an international obligation see commentary to article 12, para. (12).

⁵³⁴ E.g., the *Martini* case, *UNRIAA*, vol. II, p. 973 (1930).

⁵³⁵ In the *Bryan-Chamorro Treaty* case (*Costa Rica v. Nicaragua*), the Central American Court of Justice decided that “the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to re-establish and maintain the

involved.⁵³⁶ In others, an international court or tribunal can, by determining the legal position with binding force for the parties, award what amounts to restitution under another form.⁵³⁷ The term “restitution” in article 35 thus has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act.

(6) What may be required in terms of restitution will often depend on the content of the primary obligation which has been breached. Restitution, as the first of the forms of reparation, is of particular importance where the obligation breached is of a continuing character, and even more so where it arises under a peremptory norm of general international law. In the case, for example, of unlawful annexation of a State, the withdrawal of the occupying State’s forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution.⁵³⁸ Even so, ancillary measures (the return of persons or property seized in the course of the invasion) will be required as an aspect either of cessation or restitution.

legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics in so far as relates to matters considered in this action...” *A.J.I.L.*, vol. 11 (1917), p. 674, at p. 696; See also p. 683.

⁵³⁶ Thus the Permanent Court held that Czechoslovakia was “bound to restore to the Royal Hungarian Peter Pázmány University of Budapest the immovable property claimed by it, freed from any measure of transfer, compulsory administration, or sequestration, and in the condition in which it was before the application of the measures in question”: *Appeal from a judgement of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University)*, 1933, *P.C.I.J.*, Series A/B, No. 61, p. 208, at p. 249.

⁵³⁷ In the *Legal Status of Eastern Greenland* case, the Permanent Court decided “that the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid.”: 1933, *P.C.I.J.*, Series A/B, No. 53, p. 22, at p. 75. In *Free Zones of Upper Savoy and the District of Gex* the Permanent Court decided that France “must withdraw its customs line in accordance with the provisions of the said treaties and instruments; and that this regime must continue in force so long as it has not been modified by agreement between the Parties”: 1932, *P.C.I.J.*, Series A/B, No. 46, p. 96, at p. 172. See also F.A. Mann, “The consequences of an international wrong in international and municipal law”, *B.Y.I.L.*, vol. 48 (1976-77), p. 1 at pp. 5-8.

⁵³⁸ See above, commentary to article 30, para. (8).

(7) The obligation to make restitution is not unlimited. In particular, under article 35 restitution is required “provided and to the extent that” it is neither materially impossible nor wholly disproportionate. The phrase “provided and to the extent that” makes it clear that restitution may be only partially excluded, in which case the responsible State will be obliged to make restitution to the extent that this is neither impossible nor disproportionate.

(8) Under article 35 (a), restitution is not required if it is “materially impossible”. This would apply where property to be restored has been permanently lost or destroyed, or has deteriorated to such an extent as to be valueless. On the other hand, restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these. Under article 32 the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation, and the mere fact of political or administrative obstacles to restitution do not amount to impossibility.

(9) Material impossibility is not limited to cases where the object in question has been destroyed, but can cover more complex situations. In the *Forests of Central Rhodope* case, the claimant was entitled to only a share in the forestry operations and no claims had been brought by the other participants. The forests were not in the same condition as at the time of their wrongful taking, and detailed inquiries would be necessary to determine their condition. Since the taking, third parties had acquired rights to them. For a combination of these reasons, restitution was denied.⁵³⁹ The case supports a broad understanding of the impossibility of granting restitution, but it concerned questions of property rights within the legal system of the responsible State.⁵⁴⁰ The position may be different where the rights and obligations in issue arise directly on the international plane. In that context restitution plays a particularly important role.

⁵³⁹ *UNRIAA*, vol. III, p. 1405 (1933), at p. 1432.

⁵⁴⁰ For questions of restitution in the context of State contract arbitration see *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Government of the Libyan Arab Republic*, (1977) *I.L.R.*, vol. 53, p. 389, at pp. 507-8, para. 109; *BP Exploration Company (Libya) Ltd. v. Government of the Libyan Arab Republic*, (1974) *I.L.R.*, vol. 53, p. 297, at p. 354; *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, (1977) *I.L.R.*, vol. 62, p. 140, at p. 200.

(10) In certain cases, the position of third parties may have to be taken into account in considering whether restitution is materially possible. This was true in the *Forests of Central Rhodope* case.⁵⁴¹ But whether the position of a third party will preclude restitution will depend on the circumstances, including whether the third party at the time of entering into the transaction or assuming the disputed rights was acting in good faith and without notice of the claim to restitution.

(11) A second exception, dealt with in article 35 (b), involves those cases where the benefit to be gained from restitution is wholly disproportionate to its cost to the responsible State. Specifically, restitution may not be required if it would “involve a burden out of all proportion to the benefit deriving from restitution instead of compensation”. This applies only where there is a grave disproportionality between the burden which restitution would impose on the responsible State and the benefit which would be gained, either by the injured State or by any victim of the breach. It is thus based on considerations of equity and reasonableness,⁵⁴² although with a preference for the position of the injured State in any case where the balancing process does not indicate a clear preference for compensation as compared with restitution. The balance will invariably favour the injured State in any case where the failure to provide restitution would jeopardize its political independence or economic stability.

Article 36

Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

⁵⁴¹ *UNRIIAA*, vol. III, p. 1405 (1933), at p. 1432.

⁵⁴² See, e.g., J.H.W. Verzijl, *International Law in Historical Perspective* (Leyden, Sijthoff, 1973), part VI, p. 744, and the position taken by the Deutsche Gesellschaft für Völkerrecht, in *Yearbook ... 1969*, vol. II, p. 155.

Commentary

(1) Article 36 deals with compensation for damage caused by an internationally wrongful act, to the extent that such damage is not made good by restitution. The notion of “damage” is defined inclusively in article 31 (2) as any damage whether material or moral.⁵⁴³ Article 36 (2) develops this definition by specifying that compensation shall cover any financially assessable damage including loss of profits so far as this is established in the given case. The qualification “financially assessable” is intended to exclude compensation for what is sometimes referred to as “moral damage” to a State, i.e., the affront or injury caused by a violation of rights not associated with actual damage to property or persons: this is the subject matter of satisfaction, dealt with in article 37.

(2) Of the various forms of reparation, compensation is perhaps the most commonly sought in international practice. In the *Gabčíkovo-Nagymaros Project* case, the Court declared: “[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it”.⁵⁴⁴ It is equally well-established that an international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered.⁵⁴⁵

(3) The relationship with restitution is clarified by the final phrase of article 36 (“insofar as such damage is not made good by restitution”). Restitution, despite its primacy as a matter of legal principle, is frequently unavailable or inadequate. It may be partially or entirely ruled out either on the basis of the exceptions expressed in article 35, or because the injured State prefers

⁵⁴³ See commentary to article 31, paras. (5), (6), (8).

⁵⁴⁴ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, at p. 81, para. 152. See also the statement by the Permanent Court of International Justice in the *Factory at Chorzów* case, declaring that it is “a principle of international law that the reparation of a wrong may consist in an indemnity”: *Factory at Chorzów, Merits*, 1928, P.C.I.J., Series A, No. 17, p. 27.

⁵⁴⁵ *Factory at Chorzów, Jurisdiction*, 1927, P.C.I.J., Series A, No. 9, p. 21; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, I.C.J. Reports 1974, p. 175, at pp. 203-205, paras. 71-76; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, I.C.J. Reports 1986, p. 14, at p. 142.

compensation or for other reasons. Even where restitution is made, it may be insufficient to ensure full reparation. The role of compensation is to fill in any gaps so as to ensure full reparation for damage suffered.⁵⁴⁶ As the Umpire said in the “*Lusitania*” case:

“The fundamental concept of ‘damages’ is ... reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.”⁵⁴⁷

Likewise the role of compensation was articulated by the Permanent Court in the following terms:

“Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.”⁵⁴⁸

Entitlement to compensation for such losses is supported by extensive case law, State practice and the writings of jurists.

(4) As compared with satisfaction, the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. In other words, the function of article 36 is purely compensatory, as its title indicates. Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary

⁵⁴⁶ *Factory at Chorzów, Merits*, 1928, *P.C.I.J., Series A, No. 17*, pp. 47-8.

⁵⁴⁷ *UNRIAA*, vol. VII, p. 32 (1923), at p. 39 (emphasis in original).

⁵⁴⁸ *Factory at Chorzów, Merits*, 1928, *P.C.I.J., Series A, No. 17*, p. 47, cited and applied *inter alia* by the International Tribunal for the Law of the Sea in *The M/V “Saiga” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, judgment of 1 July 1999, para. 170. See also *Papamichalopoulos v. Greece (Art. 50)*, *E.C.H.R., Series A, No. 330-B* (1995), at para. 36 (European Court of Human Rights); *Velásquez Rodríguez, Inter-Am.Ct.H.R., Series C, No. 4* (1989), at pp. 26-27, 30-31 (Inter-American Court of Human Rights); *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran and Others*, (1984) 6 *Iran-U.S.C.T.R.* 219, at p. 225.

character.⁵⁴⁹ Thus compensation generally consists of a monetary payment, though it may sometimes take the form, as agreed, of other forms of value. It is true that monetary payments may be called for by way of satisfaction under article 37, but they perform a function distinct from that of compensation. Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured State as a result of the breach. Satisfaction is concerned with non-material injury, specifically non-material injury to the State, on which a monetary value can be put only in a highly approximate and notional way.⁵⁵⁰

(5) Consistently with other provisions of Part Two, article 36 is expressed as an obligation of the responsible State to provide reparation for the consequences flowing from the commission of an internationally wrongful act.⁵⁵¹ The scope of this obligation is delimited by the phrase “any financially assessable damage”, that is, any damage which is capable of being evaluated in financial terms. Financially assessable damage encompasses both damage suffered by the State itself (to its property or personnel or in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from an internationally wrongful act) as well as damage suffered by nationals, whether persons or companies, on whose behalf the State is claiming within the framework of diplomatic protection.

⁵⁴⁹ In *Velásquez Rodríguez (Compensation)*, the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages: *Inter-Am. Ct.H.R., Series C, No. 7* (1989), p. 52. See also *Re Letelier and Moffit*, (1992) *I.L.R.*, vol. 88, p. 727 concerning the assassination in Washington by Chilean agents of a former Chilean Minister; the *compromis* excluded any award of punitive damages, despite their availability under United States law. On punitive damages see also N. Jørgensen, “A Reappraisal of Punitive Damages in International Law”, *B.Y.I.L.*, vol. 68 (1997), p. 247; S. Wittich, “Awe of the Gods and Fear of the Priests: Punitive Damages in the Law of State Responsibility”, *Austrian Review of International and European Law*, vol. 3 (1998), p. 31.

⁵⁵⁰ See commentary to article 37, para. (3).

⁵⁵¹ For the requirement of a sufficient causal link between the internationally wrongful act and the damage see commentary to article 31, paras. (11)-(13).

- (6) In addition to the International Court of Justice, international tribunals dealing with issues of compensation include the International Tribunal for the Law of the Sea,⁵⁵² the Iran-United States Claims Tribunal,⁵⁵³ human rights courts and other bodies,⁵⁵⁴ and I.C.S.I.D. tribunals under the Washington Convention of 1965.⁵⁵⁵ Other compensation claims have been settled by agreement, normally on a without prejudice basis, with the payment of substantial compensation a term of the agreement.⁵⁵⁶ The rules and principles developed by these bodies in assessing compensation can be seen as manifestations of the general principle stated in article 36.
- (7) As to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon the content of particular primary obligations, an evaluation of the respective behaviour of the parties and, more generally, a

⁵⁵² E.g., *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, judgment of 1 July 1999, paras. 170-177.

⁵⁵³ The Iran-United States Claims Tribunal has developed a substantial jurisprudence on questions of assessment of damage and the valuation of expropriated property. For reviews of the Tribunal's jurisprudence on these subjects see *inter alia*, G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), chs. 5, 6, 12; C.N. Brower and J.D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague, Nijhoff, 1998), chs. 14-18; M. Pellonpää, "Compensable Claims Before the Tribunal: Expropriation Claims", in R.B. Lillich & D.B. McGraw (eds.), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Irvington-on-Hudson, Transnational Publishers, 1998), pp. 185-266; D.P. Stewart, "Compensation and Valuation Issues", *ibid.*, pp. 325-385.

⁵⁵⁴ For a review of the practice of such bodies in awarding compensation see D. Shelton, *Remedies in International Human Rights Law* (Oxford, Oxford University Press, 1999), pp. 214-279.

⁵⁵⁵ I.C.S.I.D. Tribunals have jurisdiction to award damages or other remedies in cases concerning investments arising between States parties and nationals. Some of these claims involve direct recourse to international law as a basis of claim. See e.g. *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, (1990) 4 I.C.S.I.D. Reports 245.

⁵⁵⁶ See e.g. *Certain Phosphate Lands in Nauru*, I.C.J. Reports 1992 p. 240, and for the Court's order of discontinuance following the settlement, I.C.J. Reports 1993, p. 322; *Passage through the Great Belt (Finland v. Denmark)*, I.C.J. Reports 1992, p. 348 (order of discontinuance following settlement); *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, I.C.J. Reports 1996, p. 9 (order of discontinuance following settlement).

concern to reach an equitable and acceptable outcome.⁵⁵⁷ The following examples illustrate the types of damage that may be compensable and the methods of quantification that may be employed.

(8) Damage to the State as such might arise out of the shooting down of its aircraft or the sinking of its ships, attacks on its diplomatic premises and personnel, damage caused to other public property, the costs incurred in responding to pollution damage, or incidental damage arising, for example, out of the need to pay pensions and medical expenses for officials injured as the result of a wrongful act. Such a list cannot be comprehensive and the categories of compensable injuries suffered by States are not closed.

(9) In the *Corfu Channel* case, the United Kingdom sought compensation in respect of three heads of damage: replacement of the destroyer *Saumarez*, which became a total loss, the damage sustained by the destroyer *Volage*, and the damage resulting from the deaths and injuries of naval personnel. The Court entrusted the assessment to expert enquiry. In respect of the destroyer *Saumarez* the Court found that “the true measure of compensation” was “the replacement cost of the [destroyer] at the time of its loss” and held that the amount of compensation claimed by the United Kingdom Government (£700,087) was justified. For the damage to the destroyer *Volage*, the experts had reached a slightly lower figure than the £93,812 claimed by the United Kingdom, “explained by the necessarily approximate nature of the valuation, especially as regards stores and equipment”. In addition to the amounts awarded for the damage to the two destroyers, the Court upheld the United Kingdom’s claim for £50,048 representing “the cost of pensions and other grants made by it to victims or their dependants, and for costs of administration, medical treatment, etc.”⁵⁵⁸

⁵⁵⁷ Cf. G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), p. 242. See also B. Graefrath, “Responsibility and damages caused: relationship between responsibility and damages”, *Recueil des cours*, vol. 185 (1984-II), p. 95 at p. 101; L. Reitzer, *La réparation comme conséquence de l’acte illicite en droit international* (Paris, Sirey, 1938); C.D. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), pp. 33-34; J. Personnaz, *La réparation du préjudice en droit international public* (Paris, 1939); M. Iovane, *La riparazione nella teoria e nella prassi dell’illecito internazionale* (Giuffré, Milan, 1990).

⁵⁵⁸ *Corfu Channel case (Assessment of Compensation)*, *I.C.J. Reports* 1949 p. 244, at p. 249.

(10) In the *M/V "Saiga"* case, Saint Vincent and the Grenadines sought compensation from Guinea following the wrongful arrest and detention of a Saint Vincent and the Grenadines' registered vessel, the *Saiga*, and its crew. The International Tribunal for the Law of the Sea awarded compensation of US\$ 2,123,357 with interest. The heads of damage compensated included, *inter alia*, damage to the vessel, including costs of repair, losses suffered with respect to charter hire of the vessel, costs related to the detention of the vessel, and damages for the detention of the captain, members of the crew and others on board the vessel. Saint Vincent and the Grenadines had claimed compensation for the violation of its rights in respect of ships flying its flag occasioned by the arrest and detention of the *Saiga*, however, the Tribunal considered that its declaration that Guinea acted wrongfully in arresting the vessel in the circumstances, and in using excessive force, constituted adequate reparation.⁵⁵⁹ Claims regarding the loss of registration revenue due to the illegal arrest of the vessel and for the expenses resulting from the time lost by officials in dealing with the arrest and detention of the ship and its crew were also unsuccessful. In respect of the former, the Tribunal held that Saint Vincent and the Grenadines failed to produce supporting evidence. In respect of the latter, the Tribunal considered that such expenses were not recoverable since they were incurred in the exercise of the normal functions of a flag State.⁵⁶⁰

(11) In a number of cases payments have been directly negotiated between injured and injuring States following wrongful attacks on ships causing damage or sinking of the vessel, and in some cases, loss of life and injury among the crew.⁵⁶¹ Similar payments have been negotiated

⁵⁵⁹ *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, judgment of 1 July 1999, para. 176.

⁵⁶⁰ *Ibid.*, para. 177.

⁵⁶¹ See the payment by Cuba to the Bahamas for the sinking by Cuban aircraft on the high seas of a Bahamian vessel, with loss of life among the crew (*R.G.D.I.P.*, vol. 85 (1981), p. 540), the payment of compensation by Israel for an attack in 1967 on the *U.S.S. Liberty*, with loss of life and injury among the crew (*R.G.D.I.P.*, vol. 85 (1981), p. 562) and the payment by Iraq of US\$ 27 million for the 37 deaths which occurred in May 1987 when Iraqi aircraft severely damaged the *U.S.S. Stark* (*A.J.I.L.*, vol. 83 (1989), p. 561).

where damage is caused to aircraft of a State, such as the “full and final settlement” agreed between Iran and the United States following a dispute over the destruction of an Iranian aircraft and the killing of its 290 passengers and crew.⁵⁶²

(12) Agreements for the payment of compensation are also frequently negotiated by States following attacks on diplomatic premises, whether in relation to damage to the embassy itself⁵⁶³ or injury to its personnel.⁵⁶⁴ Damage caused to other public property, such as roads and infrastructure, has also been the subject of compensation claims.⁵⁶⁵ In many cases these payments have been made on an ex gratia or without prejudice basis, without any admission of responsibility.⁵⁶⁶

(13) Another situation in which States may seek compensation for damage suffered by the State as such is where costs are incurred in responding to pollution damage. Following the crash of the Soviet Cosmos-954 satellite on Canadian territory in January 1978, Canada’s claim for compensation for expenses incurred in locating, recovering, removing and testing radioactive debris and cleaning up affected areas was based “jointly and separately on (a) the relevant

⁵⁶² *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, I.C.J. Reports 1996, p. 9 (order of discontinuance following settlement). For the settlement agreement itself, see the General Agreement between Iran and the United States on the Settlement of Certain I.C.J. and Tribunal Cases of 9 February 1996, made an Award on Agreed Terms by order of the Iran-United States Claims Tribunal, 22 February 1996: (1996) 32 *Iran-U.S.C.T.R.* 207, at p. 213.

⁵⁶³ See e.g. the Agreement of 1 December 1966 between the United Kingdom and Indonesia for the payment by the latter of compensation for, *inter alia*, damage to the British Embassy during mob violence (*United Kingdom Treaty Series*, No. 34 (1967)) and the payment by Pakistan to the United States of compensation for the sacking of the United States’ Embassy in Islamabad in 1979: *R.G.D.I.P.*, vol. 85 (1981), p. 880.

⁵⁶⁴ See e.g. Claim of Consul Henry R. Myers (*United States v. San Salvador*), [1890] *U.S. For. Rels.* pp. 64-65; [1892] *U.S. For. Rels.* pp. 24-43, 44, 49-51; [1893] *U.S. For. Rels.* pp. 174-179, 181-182, 184); Whiteman, *Damages*, vol. I, pp. 80-81.

⁵⁶⁵ For examples see Whiteman, *Damages*, vol. I, p. 81.

⁵⁶⁶ See e.g. United States-China agreement providing for an ex gratia payment of US\$ 4.5 million, to be given to the families of those killed and to those injured in the bombing of the Chinese Embassy in Belgrade on 7 May 1999, *A.J.I.L.*, vol. 94 (2000), p. 127.

international agreements... and (b) general principles of international law”.⁵⁶⁷ Canada asserted that it was applying “the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty”.⁵⁶⁸ The claim was eventually settled in April 1981 when the parties agreed on an ex gratia payment of Can. \$3 million (about 50 per cent of the amount claimed).⁵⁶⁹

(14) Compensation claims for pollution costs have been dealt with by the United Nations Compensation Commission in the context of assessing Iraq’s liability under international law “for any direct loss, damage - including environmental damage and the depletion of natural resources ... as a result of its unlawful invasion and occupation of Kuwait”.⁵⁷⁰ Decision 7 of the Governing Council of the Commission specifies various heads of damage encompassed by “environmental damage and the depletion of natural resources”.⁵⁷¹

(15) In cases where compensation has been awarded or agreed following an internationally wrongful act that causes or threatens environmental damage, payments have been directed to reimbursing the injured State for expenses reasonably incurred in preventing or remedying pollution, or to providing compensation for a reduction in the value of polluted property.⁵⁷²

⁵⁶⁷ Canada, Claim against the USSR for Damage Caused by Soviet Cosmos 954, 23 January 1979, *I.L.M.* vol. 18 (1979), p. 899, at p. 905.

⁵⁶⁸ *Ibid.*, at p. 906.

⁵⁶⁹ Protocol between Canada and the USSR, 2 April 1981, *I.L.M.*, vol. 20 (1981), 689.

⁵⁷⁰ S.C. Res. 687 (1991), para. 16.

⁵⁷¹ Decision 7 of 17 March 1992, *Criteria for Additional Categories of Claims*, S/AC.26/1991/7/Rev.1.

⁵⁷² See the decision of the arbitral tribunal in the *Trail Smelter Arbitration*, *UNRIAA*, vol. III, p. 1907 (1938, 1941), which provided compensation to the United States for damage to land and property caused by sulphur dioxide emissions from a smelter across the border in Canada. Compensation was assessed on the basis of the reduction in value of the affected land.

However, environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (biodiversity, amenity, etc - sometimes referred to as “non-use values”) is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify.

(16) Within the field of diplomatic protection, a good deal of guidance is available as to appropriate compensation standards and methods of valuation, especially as concerns personal injury and takings of, or damage to, tangible property. It is well-established that a State may seek compensation in respect of personal injuries suffered by its officials or nationals, over and above any direct injury it may itself have suffered in relation to the same event. Compensable personal injury encompasses not only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage suffered by the individual (sometimes, though not universally, referred to as “moral damage” in national legal systems). Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life. No less than material injury sustained by the injured State, non-material damage is financially assessable and may be the subject of a claim of compensation, as stressed in the “*Lusitania*” case.⁵⁷³ The Umpire considered that international law provides compensation for mental suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to credit and reputation, such injuries being “very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated ...”⁵⁷⁴

⁵⁷³ *UNRIAA*, vol. VII, p. 32 (1923). International tribunals have frequently granted pecuniary compensation for moral injury to private parties. E.g. *Chevreau (France v. United Kingdom)*, *ibid.*, vol. II, p. 1113 (1923); *A.J.I.L.*, vol. 27, 1933, p. 153; *Gage, UNRIAA*, vol. X, p. 226 (1903); *Di Caro, ibid.*, vol. X, p. 597 (1903); *Heirs of Jean Maninat, ibid.*, vol. X, p. 55 (1903).

⁵⁷⁴ *UNRIAA*, vol. VII, p. 32 (1923), at p. 40.

(17) International courts and tribunals have undertaken the assessment of compensation for personal injury on numerous occasions. For example, in the *M/V “Saiga”* case,⁵⁷⁵ the Tribunal held that Saint Vincent and the Grenadines’ entitlement to compensation included damages for injury to the crew, their unlawful arrest, detention and other forms of ill-treatment.

(18) Historically compensation for personal injury suffered by nationals or officials of a State arose mainly in the context of mixed claims commissions dealing with State responsibility for injury to aliens. Claims commissions awarded compensation for personal injury both in cases of wrongful death and deprivation of liberty. Where claims were made in respect of wrongful death, damages were generally based on an evaluation of the losses of the surviving heirs or successors, calculated in accordance with the well-known formula of Umpire Parker in the “*Lusitania*” case, estimating:

“the amounts (a) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (b) the pecuniary value to such claimant of the deceased’s personal services in claimant’s care, education, or supervision, and also add (c) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as [the] claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.”⁵⁷⁶

In cases of deprivation of liberty, arbitrators sometimes awarded a set amount for each day spent in detention.⁵⁷⁷ Awards were often increased when abusive conditions of confinement accompanied the wrongful arrest and imprisonment, resulting in particularly serious physical or psychological injury.⁵⁷⁸

⁵⁷⁵ *The M/V “Saiga” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, judgment of 1 July 1999.

⁵⁷⁶ *UNRIAA*, vol. VII, p. 32 (1923), at p. 35.

⁵⁷⁷ E.g. *Topaze*, *ibid.*, vol. IX, p. 387 (1903), at p. 389; *Faulkner*, *ibid.*, vol. IV, p. 67 (1926), at p. 71.

⁵⁷⁸ E.g. *William McNeil*, *ibid.*, vol. V, p. 164 (1931), at p. 168.

(19) Compensation for personal injury has also been dealt with by human rights bodies, in particular the European and Inter-American Court of Human Rights. Awards of compensation encompass material losses (loss of earnings, pensions, medical expenses etc.) and non-material damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment. Hitherto, amounts of compensation or damages awarded or recommended by these bodies have been modest.⁵⁷⁹ Nonetheless, the decisions of human rights bodies on compensation draw on principles of reparation under general international law.⁵⁸⁰

(20) In addition to a large number of lump-sum compensation agreements covering multiple claims,⁵⁸¹ property claims of nationals arising out of an internationally wrongful act have been adjudicated by a wide range of ad hoc and standing tribunals and commissions, with reported cases spanning two centuries. Given the diversity of adjudicating bodies, the awards exhibit considerable variability.⁵⁸² Nevertheless, they provide useful principles to guide the determination of compensation under this head of damage.

⁵⁷⁹ See the review by D. Shelton, *Remedies in International Human Rights Law* (Oxford, Clarendon Press, 1999), chs. 8, 9; A. Randelzhofer & C. Tomuschat (eds.), *State Responsibility and the Individual. Reparation in Instances of Grave Violations of Human Rights* (The Hague, Nijhoff, 1999); R. Pisillo Mazzeschi, "La riparazione per violazione dei diritti umani nel diritto internazionale e nella Convenzione Europea", *La Comunità Internazionale*, vol. 53 (1998), p. 215.

⁵⁸⁰ See e.g. the decision of the Inter-American Court in the *Velásquez Rodríguez*, *Inter-Am.Ct.H.R., Series C, No. 4* (1989) at pp. 26-27, 30-1. Cf. also *Papamichalopoulos v. Greece (Article 50)*, *E.C.H.R., Series A, No. 330-B* (1995), at para. 36.

⁵⁸¹ See e.g. R.B. Lillich & B.H. Weston, *International Claims: Their Settlement by Lump Sum Agreements* (Charlottesville, University Press of Virginia, 1975); B.H. Weston, R.B. Lillich and D.J. Bederman, *International Claims: Their Settlement by Lump Sum Agreements, 1975-1995* (Ardsley, N.Y., Transnational Publishers, 1999).

⁵⁸² Controversy has persisted in relation to expropriation cases, particularly over standards of compensation applicable in light of the distinction between lawful expropriation of property by the State on the one hand, and unlawful takings on the other, a distinction clearly drawn by the Permanent Court in *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17* p. 47. In a number of cases tribunals have employed the distinction to rule in favour of compensation for lost profits in cases of unlawful takings (see e.g. the observations of the arbitrator in *Libyan American Oil Company (LIAMCO) v. Government of Libya*, (1982) *I.L.R.*, vol. 62, p. 141, at pp. 202-203; and also the *Aminoil* arbitration: *Government of Kuwait v. American Independent Oil Company*, (1982) *I.L.R.*, vol. 66, p. 529, at p. 600, para. 138; and *Amoco International*

(21) The reference point for valuation purposes is the loss suffered by the claimant whose property rights have been infringed. This loss is usually assessed by reference to specific heads of damage relating to (i) compensation for capital value, (ii) compensation for loss of profits, and (iii) incidental expenses.

(22) Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the “fair market value” of the property lost.⁵⁸³ The method used to assess “fair market value”, however, depends on the nature of the asset concerned. Where the property in question or comparable property is freely traded on an open market, value is more readily determined. In such cases, the choice and application of asset-based valuation methods based on market data and the physical properties of the assets is relatively unproblematic, apart from evidentiary difficulties associated with long outstanding

Finance Corporation v. Government of the Islamic Republic of Iran, (1987) 15 *Iran-U.S.C.T.R.* 189, at p. 246, para. 192). Not all cases, however, have drawn a distinction between the applicable compensation principles based on the lawfulness or unlawfulness of the taking. See e.g. the decision of the Iran-United States Tribunal in *Phillips Petroleum Co. Iran v. Government of the Islamic Republic of Iran*, (1989) 21 *Iran-U.S.C.T.R.* 79, at p. 122, para. 110. See also *Starrett Housing Corp. v. Government of the Islamic Republic of Iran*, (1987) 16 *Iran-U.S.C.T.R.* 79 where the Tribunal made no distinction in terms of the lawfulness of the taking and its award included compensation for lost profits.

⁵⁸³ See *American International Group, Inc. v. Government of the Islamic Republic of Iran*, which stated that, under general international law, “the valuation should be made on the basis of the fair market value of the shares”: (1983) 4 *Iran-U.S.C.T.R.* 96, at p. 106. In *Starrett Housing Corp. v. Government of the Islamic Republic of Iran*, the Tribunal accepted its expert’s concept of fair market value “as the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat”: (1987) 16 *Iran-U.S.C.T.R.* 112, at p. 201. See also the *World Bank Guidelines on the Treatment of Foreign Direct Investment*, which state in paragraph 3 of Part IV that compensation “will be deemed adequate if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known”: World Bank, *Legal Framework for the Treatment of Foreign Investment*, 2 vols., (Washington, I.B.R.D., 1992), vol. II, p. 41. Likewise, according to Article 13 (1) of the Energy Charter Treaty, *I.L.M.*, vol. 33 (1994), p. 360, compensation for expropriation “shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation ...”

claims.⁵⁸⁴ Where the property interests in question are unique or unusual, for example, art works or other cultural property,⁵⁸⁵ or are not the subject of frequent or recent market transactions, the determination of value is more difficult. This may be true, for example, in respect of certain business entities in the nature of a going concern, especially if shares are not regularly traded.⁵⁸⁶

(23) Decisions of various ad hoc tribunals since 1945 have been dominated by claims in respect of nationalized business entities. The preferred approach in these cases has been to examine the assets of the business, making allowance for goodwill and profitability as appropriate. This method has the advantage of grounding compensation as much as possible in some objective assessment of value linked to the tangible asset backing of the business. The value of goodwill and other indicators of profitability may be uncertain, unless derived from information provided by a recent sale or acceptable arms-length offer. Yet, for profitable business entities where the whole is greater than the sum of the parts, compensation would be incomplete without paying due regard to such factors.⁵⁸⁷

(24) An alternative valuation method for capital loss is the determination of net book value, i.e., the difference between the total assets of the business and total liabilities as shown on its books. Its advantages are that the figures can be determined by reference to market costs, they

⁵⁸⁴ Particularly in the case of lump sum settlements, agreements have been concluded decades after the claims arose. See e.g. the U.S.S.R.-U.K. Agreement of 15 July 1986 concerning claims dating back to 1917 and the China-U.K. Agreement of 5 June 1987 in respect of claims arising in 1949. In such cases, the choice of valuation method was sometimes determined by availability of evidence.

⁵⁸⁵ See Report and Recommendations Made by the Panel of Commissioners concerning Part Two of the First Instalment of Individual Claims for Damages above US\$ 100,000, 12 March 1998, S/AC.26/1998/3, paras. 48-49, where the U.N.C.C. considered a compensation claim in relation to the taking of the claimant's Islamic art collection by Iraqi military personnel.

⁵⁸⁶ Where share prices provide good evidence of value, they may be utilized, as in *INA Corporation v. Islamic Republic of Iran*, (1985) 8 *Iran-U.S.C.T.R.* 373.

⁵⁸⁷ Early claims recognized that that even where a taking of property was lawful, compensation for a going concern called for something more than the value of the property elements of the business. The American-Mexican Claims Commission in rejecting a claim for lost profits in the case of a lawful taking stated that payment for property elements would be "augmented by the existence of those elements which constitute a going concern": *Wells Fargo and Company v. Mexico (Decision No. 22-B)*, American-Mexican Claims Commission (1926), p. 153. See also Decision No. 9 of the United Nations Compensation Commission Governing Council, S/AC.26/1992/9, para. 16.

are normally drawn from a contemporaneous record, and they are based on data generated for some other purpose than supporting the claim. Accordingly, net book value (or some variant of this method) has been employed to assess the value of businesses. The limitations of the method lie in the reliance on historical figures, the use of accounting principles which tend to undervalue assets, especially in periods of inflation, and the fact that the purpose for which the figures were produced does not take account of the compensation context and any rules specific to it. The balance sheet may contain an entry for goodwill, but the reliability of such figures depends upon their proximity to the moment of an actual sale.

(25) In cases where a business is not a going concern,⁵⁸⁸ so-called “break-up”, “liquidation” or “dissolution” value is generally employed. In such cases no provision is made for value over and above the market value of the individual assets. Techniques have been developed to construct, in the absence of actual transactions, hypothetical values representing what a willing buyer and willing seller might agree.⁵⁸⁹

(26) Since 1945, valuation techniques have been developed to factor in different elements of risk and probability.⁵⁹⁰ The discounted cash flow (DCF) method has gained some favour, especially in the context of calculations involving income over a limited duration, as in the case of wasting assets. Although developed as a tool for assessing commercial value, it can also be

⁵⁸⁸ For an example of a business found not to be a going concern see *Phelps Dodge Corp. v. Islamic Republic of Iran*, (1986) 10 *Iran-U.S.C.T.R.* 121 where the enterprise had not been established long enough to demonstrate its viability. In *Sedco v. NIOC*, claimant sought dissolution value only: (1986) 10 *Iran-U.S.C.T.R.* 180.

⁵⁸⁹ The hypothetical nature of the result is discussed in *Amoco International Finance Corp. v. Islamic Republic of Iran*, (1987) 15 *Iran-U.S.C.T.R.* 189, at pp. 256-7, paras. 220-223.

⁵⁹⁰ See for example the detailed methodology developed by the U.N.C.C. for assessing Kuwaiti corporate claims (Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of “E4” Claims, 19 March 1999, S/AC.26/1999/4, paras 32-62) and claims filed on behalf of non-Kuwaiti corporations and other business entities, excluding oil sector, construction/engineering and export guarantee claims (Report and Recommendations made by the Panel of Commissioners concerning the Third Instalment of “E2” Claims, 9 December 1999, S/AC.26/1999/22).

useful in the context of calculating value for compensation purposes.⁵⁹¹ But difficulties can arise in the application of the DCF method to establish capital value in the compensation context. The method analyses a wide range of inherently speculative elements, some of which have a significant impact upon the outcome (e.g. discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks). This has led tribunals to adopt a cautious approach to the use of the method. Hence although income-based methods have been accepted in principle, there has been a decided preference for asset-based methods.⁵⁹² A particular concern is the risk of double-counting which arises from the relationship between the capital value of an enterprise and its contractually based profits.⁵⁹³

(27) Paragraph 2 of article 36 recognizes that in certain cases compensation for loss of profits may be appropriate. International tribunals have included an award for loss of profits in assessing compensation: for example the decisions in the *Cape Horn Pigeon* case⁵⁹⁴ and

⁵⁹¹ The use of the discounted cash flow method to assess capital value was analysed in some detail in *Amoco International Finance Corp. v. Islamic Republic of Iran*, (1987) 15 *Iran-U.S.C.T.R.* 189; *Starrett Housing Corp. v. Islamic Republic of Iran*, (1987) 16 *Iran-U.S.C.T.R.* 112; *Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, (1989) 21 *Iran U.S.C.T.R.* 79; and *Ebrahimi (Shahin Shaine) v. Islamic Republic of Iran*, (1994) 30 *Iran U.S.C.T.R.* 170.

⁵⁹² See e.g. *Amoco International Finance Corp. v. Islamic Republic of Iran*, 15 *Iran-U.S.C.T.R.* 189 (1987); *Starrett Housing Corp. v. Islamic Republic of Iran*, 16 *Iran-U.S.C.T.R.* 112 (1987), *Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, 21 *Iran-U.S.C.T.R.* 79 (1989). In the context of claims for lost profits, there is a corresponding preference for claims to be based on past performance rather than forecasts. For example, the United Nations Compensation Commission guidelines on valuation of business losses in Decision 9 (S/AC.26/1992/9, para. 19) state: “The method of a valuation should therefore be one that focuses on past performance rather than on forecasts and projections into the future.”

⁵⁹³ See e.g. *Ebrahimi (Shahin Shaine) v. Islamic Republic of Iran*, (1994) 30 *Iran-U.S.C.T.R.* 170, para. 159.

⁵⁹⁴ *United States of America v. Russia*, *UNRIAA*, vol. IX, p. 63 (1902), (including compensation for lost profits resulting from the seizure of an American whaler). Similar conclusions were reached in the *Delagoa Bay Railway* case (1900), Martens, *Nouveau Recueil*, 2nd series, vol. XXX, p. 329; Moore, *International Arbitrations*, vol. II, p. 1865 (1900), the *William Lee* case, Moore, *International Arbitrations*, vol. IV, pp. 3405-3407 (1867) and the *Yuille Shortridge and Co.* case (*Great Britain v. Portugal*), de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. II, p. 78 (1861). Contrast the decisions in the *Canada* case (*United States of America v. Brazil*), Moore, *International Arbitrations*, vol. II, p. 1733 (1870) and the *Lacaze* case, de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. II, p. 290.

Sapphire International Petroleum Ltd. v. National Iranian Oil Company.⁵⁹⁵ Loss of profits played a role in the *Factory at Chorzów* case itself, the Permanent Court deciding that the injured party should receive the value of property by way of damages not as it stood at the time of expropriation but at the time of indemnification.⁵⁹⁶ Awards for loss of profits have also been made in respect of contract-based lost profits in *Libyan American Oil Company (LIAMCO) v. Libya*⁵⁹⁷ and in some I.C.S.I.D. arbitrations.⁵⁹⁸ Nevertheless, lost profits have not been as commonly awarded in practice as compensation for accrued losses. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements.⁵⁹⁹ When compared with tangible assets, profits (and intangible assets which are income-based) are relatively vulnerable to commercial and political risks, and increasingly so the further into the future projections are made. In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a

⁵⁹⁵ (1963) *I.L.R.*, vol. 35, p. 136, at pp. 187, 189.

⁵⁹⁶ *Factory at Chorzów (Merits)*, 1928, *P.C.I.J. Series A, No. 17*, pp. 47-48, 53.

⁵⁹⁷ (1977) *I.L.R.*, vol. 62, p. 140.

⁵⁹⁸ See, e.g., *Amco Asia Corp. and Others v. Republic of Indonesia*, First Arbitration (1984); Annulment (1986); Resubmitted Case, (1990) 1 *I.C.S.I.D. Reports* 377; *AGIP Spa v. Government of the People's Republic of the Congo*, (1979) 1 *I.C.S.I.D. Reports* 306.

⁵⁹⁹ According to the arbitrator in the *Shufeldt (USA/Guatemala)* case, *UNRIAA*, vol. II, p. 1079 (1930), at p. 1099, “the *lucrum cessans* must be the direct fruit of the contract and not too remote or speculative”. See also *Amco Asia Corp. and Others v. Republic of Indonesia*, (1990) 1 *I.C.S.I.D. Reports* 569, at p. 612, para. 178 where it was stated that “non-speculative profits” were recoverable. The U.N.C.C. has also stressed the requirement for claimants to provide “clear and convincing evidence of ongoing and expected profitability” (see Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of “E3” Claims, 17 December 1998 (S/AC.26/1998/13), para. 147). In assessing claims for lost profits on construction contracts, Panels have generally required that the claimant’s calculation take into account the risk inherent in the project (*ibid.*, para. 157; Report and Recommendations made by the Panel of Commissioners concerning the Fourth Instalment of “E3” Claims, 30 September 1999 (S/AC.26/1999/14), para. 126).

legally protected interest of sufficient certainty to be compensable.⁶⁰⁰ This has normally been achieved by virtue of contractual arrangements or, in some cases, a well-established history of dealings.⁶⁰¹

(28) Three categories of loss of profits may be distinguished: first, lost profits from income-producing property during a period when there has been no interference with title as distinct from temporary loss of use; secondly, lost profits from income-producing property between the date of taking of title and adjudication,⁶⁰² and thirdly, lost future profits in which profits anticipated after the date of adjudication are awarded.⁶⁰³

⁶⁰⁰ In considering claims for future profits, the U.N.C.C. Panel dealing with the fourth instalment of “E3” claims expressed the view that in order for such claims to warrant a recommendation, “it is necessary to demonstrate by sufficient documentary and other appropriate evidence a history of successful (i.e. profitable) operation, and a state of affairs which warrants the conclusion that the hypothesis that there would have been future profitable contracts is well founded”: Report and Recommendations made by the Panel of Commissioners concerning the Fourth Instalment of “E3” Claims, 30 September 1999, (S/AC.26/1999/14), para. 140.

⁶⁰¹ According to Whiteman, “in order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were *reasonably* anticipated; and that the profits anticipated were probable and not merely possible”: Whiteman, *Damages*, vol. III, p. 1837.

⁶⁰² This is most commonly associated with the deprivation of property, as opposed to wrongful termination of a contract or concession. If restitution were awarded, the award of lost profits would be analogous to cases of temporary dispossession. If restitution is not awarded, as in the *Factory at Chorzów (Merits)*, 1928, *P.C.I.J. Series A, No. 17*, p. 47 and *Norwegian Shipowners (Norway/USA)*, *UNRIAA*, vol. I, p. 307 (1922), lost profits may be awarded up to the time when compensation is made available as a substitute for restitution.

⁶⁰³ Awards of lost future profits have been made in the context of a contractually protected income stream, as in the *Amco Asia* case (*Amco Asia Corp. and Others v. Republic of Indonesia*, First Arbitration (1984); Annulment (1986); Resubmitted Case, (1990) 1 *I.C.S.I.D. Reports* 377), rather than on the basis of the taking of income-producing property. In the UN Compensation Commission’s Report and Recommendations on the Second Instalment of “E2” Claims (S/AC.26/1999/6), dealing with reduced profits, the Panel found that losses arising from a decline in business were compensable even though tangible property was not affected and the businesses continued to operate throughout the relevant period (*ibid.*, para. 76).

(29) The first category involves claims for loss of profits due to the temporary loss of use and enjoyment of the income-producing asset.⁶⁰⁴ In these cases there is no interference with title and hence in the relevant period the loss compensated is the income to which the claimant was entitled by virtue of undisturbed ownership.

(30) The second category of claims relates to the unlawful taking of income-producing property. In such cases lost profits have been awarded for the period up to the time of adjudication. In the *Factory at Chorzów* case,⁶⁰⁵ this took the form of re-invested income, representing profits from the time of taking to the time of adjudication. In the *Norwegian Shipowners* case,⁶⁰⁶ lost profits were similarly not awarded for any period beyond the date of adjudication. Once the capital value of income-producing property has been restored through the mechanism of compensation, funds paid by way of compensation can once again be invested to re-establish an income stream. Although the rationale for the award of lost profits in these cases is less clearly articulated, it may be attributed to a recognition of the claimant's continuing beneficial interest in the property up to the moment when potential restitution is converted to a compensation payment.⁶⁰⁷

(31) The third category of claims for loss of profits arises in the context of concessions and other contractually protected interests. Again, in such cases, lost future income has sometimes been awarded.⁶⁰⁸ In the case of contracts, it is the future income stream which is compensated,

⁶⁰⁴ Many of the early cases concern vessels seized and detained. In *The "Montijo"*, an American vessel seized in Panama, the Umpire allowed a sum of money per day for loss of the use of the vessel: Moore, *International Arbitrations*, vol. II, p. 1421 (1875). In *The "Betsey"*, compensation was awarded not only for the value of the cargo seized and detained, but also for demurrage for the period representing loss of use: Moore, *International Adjudications*, vol. V, p. 47, at p. 113 (1794).

⁶⁰⁵ *Factory at Chorzów (Merits)*, 1928, *P.C.I.J. Series A, No. 17*, p. 47.

⁶⁰⁶ *Norwegian Shipowners (Norway/USA)*, *UNRIAA*, vol. I, p. 307 (1922).

⁶⁰⁷ For the approach of the U.N.C.C. in dealing with loss of profits claims associated with the destruction of businesses following the Iraqi invasion of Kuwait, see Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of "E4" Claims, 19 March 1999, (S/AC.26/1999/4), paras. 184-187.

⁶⁰⁸ In some cases, lost profits were not awarded beyond the date of adjudication, though for reasons unrelated to the nature of the income-producing property. See e.g., *Robert May (United States v. Guatemala)*, 1900 For. Rel. 648; Whiteman, *Damages*, vol III, pp. 1704, 1860,

up to the time when the legal recognition of entitlement ends. In some contracts this is immediate, e.g. where the contract is determinable at the instance of the State,⁶⁰⁹ or where some other basis for contractual termination exists. Or it may arise from some future date dictated by the terms of the contract itself.

(32) In other cases lost profits have been excluded on the basis that they were not sufficiently established as a legally protected interest. In the *Oscar Chinn* case⁶¹⁰ a monopoly was not accorded the status of an acquired right. In the *Asian Agricultural Products* case,⁶¹¹ a claim for lost profits by a newly established business was rejected for lack of evidence of established earnings. Claims for lost profits are also subject to the usual range of limitations on the recovery of damages, such as causation, remoteness, evidentiary requirements and accounting principles, which seek to discount speculative elements from projected figures.

(33) If loss of profits are to be awarded, it is inappropriate to award interest under article 38 on the profit-earning capital over the same period of time, simply because the capital sum cannot be simultaneously earning interest and generating profits. The essential aim is to avoid double recovery while ensuring full reparation.

where the concession had expired. In other cases, circumstances giving rise to *force majeure* had the effect of suspending contractual obligations: see e.g. *Gould Marketing, Inc. v. Ministry of Defence*, (1984) 6 *Iran-U.S.C.T.R.* 272; *Sylvania Technical Systems v. Islamic Republic of Iran*, (1985) 8 *Iran-U.S.C.T.R.* 298. In *Delagoa Bay Railway Co. (Great Britain, United States of America/Portugal)*, Martens, *Nouveau Recueil*, 2nd series, vol. XXX, p. 329; Moore, *International Arbitrations*, vol. II, p. 1865 (1900), and in *Shufeldt (USA/Guatemala)*, *UNRIAA*, vol. II, p. 1079 (1930), lost profits were awarded in respect of a concession which had been terminated. In *Sapphire International Petroleum Ltd v. National Iranian Oil Company*, (1963) *I.L.R.*, vol. 35, p. 136; *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, (1977) *I.L.R.*, vol. 62, p. 140 and *Amco Asia Corp. and Others v. Republic of Indonesia*, First Arbitration (1984); Annulment (1986); Resubmitted Case (1990), 1 *I.C.S.I.D. Reports* 377, awards of lost profits were also sustained on the basis of contractual relationships.

⁶⁰⁹ As in *Sylvania Technical Systems v. Islamic Republic of Iran*, (1985) 8 *Iran-U.S.C.T.R.* 298.

⁶¹⁰ 1934, *P.C.I.J., Series A/B, No. 63*, p. 65.

⁶¹¹ *Asian Agricultural Products Ltd v. Democratic Socialist Republic of Sri Lanka*, (1990) 4 *I.C.S.I.D. Reports* 245.

(34) It is well established that incidental expenses are compensable if they were reasonably incurred to repair damage and otherwise mitigate loss arising from the breach.⁶¹² Such expenses may be associated for example with the displacement of staff or the need to store or sell undelivered products at a loss.

Article 37

Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Commentary

- (1) Satisfaction is the third form of reparation which the responsible State may have to provide in discharge of its obligation to make full reparation for the injury caused by an internationally wrongful act. It is not a standard form of reparation, in the sense that in many cases the injury caused by an internationally wrongful act of a State may be fully repaired by restitution and/or compensation. The rather exceptional character of the remedy of satisfaction, and its relationship to the principle of full reparation, are emphasized by the phrase “insofar as [the injury] cannot be made good by restitution or compensation”. It is only in those cases where those two forms have not provided full reparation that satisfaction may be required.
- (2) Article 37 is divided into three paragraphs, each dealing with a separate aspect of satisfaction. Paragraph 1 addresses the legal character of satisfaction and the types of injury for which it may be granted. Paragraph 2 describes, in a non-exhaustive fashion, some modalities of

⁶¹² Compensation for incidental expenses has been awarded by the United Nations Compensation Commission (Report and Recommendations on the First Instalment of “E2” Claims (S/AC.26/1998/7) where compensation was awarded for evacuation and relief costs (paras. 133, 153 and 249), repatriation (para. 228), termination costs (para. 214), renovation costs (para. 225) and expenses in mitigation (para. 183)) and by the Iran-United States Claims Tribunal (see *General Electric Company v. Islamic Republic of Iran*, (1991) 26 *Iran-U.S.C.T.R.* 148, at pp. 165-167, 168-169, paras. 56-60, 67-69, awarding compensation for items resold at a loss and for storage costs).

satisfaction. Paragraph 3 places limitations on the obligation to give satisfaction, having regard to former practices in cases where unreasonable forms of satisfaction were sometimes demanded.

(3) In accordance with paragraph 1, the injury for which a responsible State is obliged to make full reparation embraces “any damage, whether material or moral, caused by the internationally wrongful act of a State.” Material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation. Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned.

(4) The availability of the remedy of satisfaction for injury of this kind, sometimes described as “non-material injury”,⁶¹³ is well-established in international law. The point was made, for example, by the Tribunal in the *Rainbow Warrior* arbitration:

“There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities”.⁶¹⁴

State practice also provides many instances of claims for satisfaction in circumstances where the internationally wrongful act of a State causes non-material injury to another State. Examples include situations of insults to the symbols of the State, such as the national flag,⁶¹⁵ violations of

⁶¹³ See C. Dominicé, “De la réparation constructive du préjudice immatériel souffert par un État”, in *L'ordre juridique international entre tradition et innovation; Recueil d'études* (Paris, P.U.F., 1997) p. 349, at p. 354.

⁶¹⁴ *Rainbow Warrior (New Zealand/France)*, UNRIAA, vol. XX, p. 217 (1990), at pp. 272-273, para. 122.

⁶¹⁵ Examples are the *Magee* case (1874) (Whiteman, *Damages*, vol. I, p. 64), the *Petit Vaisseau* case (1863) (Whiteman, *Damages*, 2nd series, vol. III, No. 2564) and the case that arose from the insult to the French flag in Berlin in 1920 (C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), pp. 186-187).

sovereignty or territorial integrity,⁶¹⁶ attacks on ships or aircraft,⁶¹⁷ ill-treatment of or deliberate attacks on heads of State or Government or diplomatic or consular representatives or other protected persons⁶¹⁸ and violations of the premises of embassies or consulates or of the residences of members of the mission.⁶¹⁹

(5) Paragraph 2 of article 37 provides that satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. The forms of satisfaction listed in the article are no more than examples. The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.⁶²⁰ Many possibilities exist, including due inquiry into the causes of an accident resulting in harm or

⁶¹⁶ As occurred in the *Rainbow Warrior* arbitration, *UNRIAA*, vol. XX, p. 217 (1990).

⁶¹⁷ Examples include the attack carried out in 1961 against a Soviet aircraft transporting President Brezhnev by French fighter planes over the international waters of the Mediterranean (*R.G.D.I.P.*, vol. 65 (1961), p. 603); and the sinking of a Bahamian ship in 1980 by a Cuban aircraft (*R.G.D.I.P.*, vol. 84 (1980), pp. 1078-1079).

⁶¹⁸ See F. Przetacznik, "La responsabilité internationale de l'Etat à raison des préjudices de caractère moral et politique causés à un autre Etat", *R.G.D.I.P.*, vol. 78 (1974), p. 917, at p. 951.

⁶¹⁹ Examples include the attack by demonstrators in 1851 on the Spanish Consulate in New Orleans (Moore, *Digest*, vol. VI, p. 811, at p. 812), and the failed attempt of two Egyptian policemen, in 1888, to intrude upon the premises of the Italian Consulate at Alexandria (*La prassi italiana di diritto internazionale*, 2nd series, (Dobbs Ferry, N.Y., Oceana, 1970) vol. III, No. 2558). Also see cases of apologies and expressions of regret following demonstrations in front of the French Embassy in Belgrade in 1961 (*R.G.D.I.P.*, vol. 65 (1961), p. 610), and the fires in the libraries of the United States Information Services in Cairo in 1964 (*R.G.D.I.P.*, vol. 69 (1965), pp. 130-131) and in Karachi in 1965 (*R.G.D.I.P.*, vol. 70 (1966), pp. 165-166).

⁶²⁰ In the *Rainbow Warrior* arbitration the Tribunal, while rejecting New Zealand's claims for restitution and/or cessation and declining to award compensation, made various declarations by way of satisfaction, and in addition a recommendation "to assist [the parties] in putting an end to the present unhappy affair". Specifically it recommended that France contribute US\$2 million to a fund to be established "to promote close and friendly relations between the citizens of the two countries". See *UNRIAA*, vol. XX, p. 217 (1990), at p. 274, paras. 126-127. See further L. Migliorino, "Sur la déclaration d'illicéité comme forme de satisfaction: à propos de la sentence arbitrale du 30 avril 1990 dans l'affaire du Rainbow warrior", *R.G.D.I.P.*, vol. 96 (1992), p. 61.

injury,⁶²¹ a trust fund to manage compensation payments in the interests of the beneficiaries, disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act⁶²² or the award of symbolic damages for non-pecuniary injury.⁶²³ Assurances or guarantees of non-repetition, which are dealt with in the Articles in the context of cessation, may also amount to a form of satisfaction.⁶²⁴ Paragraph 2 does not attempt to list all the possibilities, but neither is it intended to exclude them. Moreover the order of the modalities of satisfaction in paragraph 2 is not intended to reflect any hierarchy or preference. Paragraph 2 simply gives examples which are not listed in order of appropriateness or seriousness. The appropriate mode, if any, will be determined having regard to the circumstances of each case.

(6) One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal. The utility of declaratory relief as a form of satisfaction in the case of non-material injury to a State was affirmed by the International Court in the *Corfu Channel* case, where the Court, after finding unlawful a mine-sweeping operation (Operation Retail) carried out by the British Navy after the explosion, said:

“to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty. This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.”⁶²⁵

⁶²¹ E.g. the United States naval inquiry into the causes of the collision between an American submarine and the Japanese fishing vessel, the *Ehime Maru*, in waters off Honolulu: *New York Times*, 8 February 2001, section 1, p. 1, col. 6.

⁶²² Action against the guilty individuals was requested in the case of the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations (Whiteman, *Digest*, vol. 8, pp. 742-743) and in the case of the killing of two United States officers in Tehran (*R.G.D.I.P.*, vol. 80, p. 257).

⁶²³ See, e.g., *The “I’m Alone”*, *UNRIAA*, vol. III, p. 1609 (1935); *Rainbow Warrior*, *ibid.*, vol. XX, p. 217 (1990).

⁶²⁴ See commentary to article 30, para. (11).

⁶²⁵ *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 4, at p. 35, repeated in the *dispositif* at p. 36.

This has been followed in many subsequent cases.⁶²⁶ However, while the making of a declaration by a competent court or tribunal may be treated as a form of satisfaction in a given case, such declarations are not intrinsically associated with the remedy of satisfaction. Any court or tribunal which has jurisdiction over a dispute has the authority to determine the lawfulness of the conduct in question and to make a declaration of its findings, as a necessary part of the process of determining the case. Such a declaration may be a preliminary to a decision on any form of reparation, or it may be the only remedy sought. What the Court did in the *Corfu Channel* case was to use a declaration as a form of satisfaction in a case where Albania had sought no other form. Moreover such a declaration has further advantages: it should be clear and self-contained and will by definition not exceed the scope or limits of satisfaction referred to in paragraph 3 of article 37. A judicial declaration is not listed in paragraph 2 only because it must emanate from a competent third party with jurisdiction over a dispute, and the Articles are not concerned to specify such a party or to deal with issues of judicial jurisdiction. Instead, article 37 specifies the acknowledgement of the breach by the responsible State as a modality of satisfaction.

(7) Another common form of satisfaction is an apology, which may be given verbally or in writing by an appropriate official or even the head of State. Expressions of regret or apologies were required in the “*I’m Alone*”,⁶²⁷ *Kellett*⁶²⁸ and *Rainbow Warrior* cases,⁶²⁹ and were offered by the responsible State in the *Consular Relations*⁶³⁰ and *LaGrand* cases.⁶³¹ Requests for, or offers of, an apology are a quite frequent feature of diplomatic practice and the tender of a timely apology, where the circumstances justify it, can do much to resolve a dispute. In other

⁶²⁶ E.g., *Rainbow Warrior*, *UNRIAA*, vol. XX, p. 217 (1990), at p. 273, para. 123.

⁶²⁷ *Ibid.*, vol. III, p. 1609 (1935).

⁶²⁸ Moore, *Digest*, vol. V, p. 43 (1897).

⁶²⁹ *UNRIAA*, vol. XX, p. 217 (1990).

⁶³⁰ *Vienna Convention on Consular Relations (Paraguay v. United States)*, *Provisional Measures*, *I.C.J. Reports 1998*, p. 248. For the text of the United States’ apology see U.S. Department of State, Text of Statement Released in Asunción, Paraguay; Press Statement by James P. Rubin, Spokesman, 4 November 1998. For the order discontinuing proceedings, see *I.C.J. Reports 1998*, p. 426.

⁶³¹ *LaGrand (Germany v. United States of America)*, *Provisional Measures*, *I.C.J. Reports 1999*, p. 9, and *LaGrand (Germany v. United States of America)*, *Merits*, judgment of 27 June 2001.

circumstances an apology may not be called for, e.g. where a case is settled on an ex gratia basis, or it may be insufficient. In the *LaGrand* case the Court considered that “an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties”.⁶³²

(8) Excessive demands made under the guise of “satisfaction” in the past⁶³³ suggest the need to impose some limit on the measures that can be sought by way of satisfaction to prevent abuses, inconsistent with the principle of the equality of States.⁶³⁴ In particular, satisfaction is not intended to be punitive in character, nor does it include punitive damages. Paragraph 3 of article 37 places limitations on the obligation to give satisfaction by setting out two criteria: first, the proportionality of satisfaction to the injury; second, the requirement that satisfaction should not be humiliating to the responsible State. It is true that the term “humiliating” is imprecise, but there are certainly historical examples of demands of this kind.

Article 38

Interest

1. Interest on any principal sum payable under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

⁶³² Ibid., para. 123.

⁶³³ E.g., the joint note presented to the Chinese Government in 1900 following the Boxer uprising and the demand by the Conference of Ambassadors against Greece in the “Tellini” affair in 1923: see C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), pp. 187-188.

⁶³⁴ The need to prevent the abuse of satisfaction was stressed by early writers such as J.C. Bluntschli, *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt*, (3rd edn.) (Nördlingen, 1878); French trans. by C. Lardy, *Le droit international codifié*, (5th rev. edn.) (Paris, 1895), pp. 268-269.

Commentary

- (1) Interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case. For this reason the term “principal sum” is used in article 38 rather than “compensation”. Nevertheless, an award of interest may be required in some cases in order to provide full reparation for the injury caused by an internationally wrongful act, and it is normally the subject of separate treatment in claims for reparation and in the awards of tribunals.
- (2) As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgment or award concerning, the claim and to the extent that it is necessary to ensure full reparation.⁶³⁵ Support for a general rule favouring the award of interest as an aspect of full reparation is found in international jurisprudence.⁶³⁶ In *The S.S. “Wimbledon”*, the Permanent Court awarded simple interest at 6 per cent as from the date of judgment, on the basis that interest was only payable “from the moment when the amount of the sum due has been fixed and the obligation to pay has been established”.⁶³⁷
- (3) Issues of the award of interest have frequently arisen in other tribunals, both in cases where the underlying claim involved injury to private parties and where the injury was to the State itself.⁶³⁸ The experience of the Iran-United States Claims Tribunal is worth noting. In *Islamic Republic of Iran v. United States of America (Case A-19)*, the Full Tribunal held that its general jurisdiction to deal with claims included the power to award interest, but it declined to

⁶³⁵ Thus interest may not be allowed where the loss is assessed in current value terms as at the date of the award. See the *Lighthouses* arbitration, *UNRIAA*, vol. XII, p. 155 (1956), at pp. 252-253.

⁶³⁶ See, e.g., the awards of interest made in the *Illinois Central Railroad* case, *UNRIAA*, vol. IV, p. 134 (1926); the *Lucas* case (1966) *I.L.R.*, vol. 30, p. 220; see also *Administrative Decision No. III* of the United States-German Mixed Claims Commission, *UNRIAA*, vol. VII, pp. 66 (1923).

⁶³⁷ 1923, *P.C.I.J., Series A, No. 1*, p. 32. The Court accepted the French claim for an interest rate of 6 per cent as fair, having regard to “the present financial situation of the world and ... the conditions prevailing for public loans”.

⁶³⁸ In *The M/V “Saiga” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, the International Tribunal on the Law of the Sea awarded interest at different rates in respect of different categories of loss: see judgment of 1 July 1999, para. 173.

lay down uniform standards for the award of interest on the ground that this fell within the jurisdiction of each Chamber and related “to the exercise ... of the discretion accorded to them in deciding each particular case”.⁶³⁹ On the issue of principle the Tribunal said:

“Claims for interest are part of the compensation sought and do not constitute a separate cause of action requiring their own independent jurisdictional grant. This Tribunal is required by Article V of the Claims Settlement Declaration to decide claims ‘on the basis of respect for law’. In doing so, it has regularly treated interest, where sought, as forming an integral part of the ‘claim’ which it has a duty to decide. The Tribunal notes that the Chambers have been consistent in awarding interest as ‘compensation for damages suffered due to delay in payment’... Indeed, it is customary for arbitral tribunals to award interest as part of an award for damages, notwithstanding the absence of any express reference to interest in the *compromis*. Given that the power to award interest is inherent in the Tribunal’s authority to decide claims, the exclusion of such power could only be established by an express provision in the Claims Settlement Declaration. No such provision exists. Consequently, the Tribunal concludes that it is clearly within its power to award interest as compensation for damage suffered.”⁶⁴⁰

The Tribunal has awarded interest at a different and slightly lower rate in respect of intergovernmental claims.⁶⁴¹ It has not awarded interest in certain cases, for example where a lump-sum award was considered as reflecting full compensation, or where other special circumstances pertained.⁶⁴²

⁶³⁹ (1987) 16 *Iran-U.S.C.T.R.* 285, at p. 290. G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996) pp. 475-6 points out, the practice of the three Chambers has not been entirely uniform.

⁶⁴⁰ (1987) 16 *Iran-U.S.C.T.R.* 285, at pp. 289-90.

⁶⁴¹ See C.N. Brower & J.D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague, Nijhoff, 1998), pp. 626-7, with references to the cases. The rate adopted was 10 per cent, as compared with 12 per cent for commercial claims.

⁶⁴² See the detailed analysis of Chamber Three in *McCullough & Co. Inc. v. Ministry of Post, Telegraph & Telephone & Others*, (1986) 11 *Iran-U.S.C.T.R.* 3, at pp. 26-31.

(4) Decision 16 of the Governing Council of the United Nations Compensation Commission deals with the question of interest. It provides:

- “1. Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.
2. The methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time.
3. Interest will be paid after the principal amount of awards.”⁶⁴³

This provision combines a decision in principle in favour of interest where necessary to compensate a claimant with flexibility in terms of the application of that principle. At the same time, interest, while a form of compensation, is regarded as a secondary element, subordinated to the principal amount of the claim.

(5) Awards of interest have also been envisaged by human rights courts and tribunals, even though the compensation practice of these bodies is relatively cautious and the claims are almost always unliquidated. This is done, for example, to protect the value of a damages award payable by instalments over time.⁶⁴⁴

(6) In their more recent practice, national compensation commissions and tribunals have also generally allowed for interest in assessing compensation. However in certain cases of partial lump-sum settlements, claims have been expressly limited to the amount of the principal loss, on the basis that with a limited fund to be distributed, claims to principal should take priority.⁶⁴⁵

⁶⁴³ “Awards of Interest”, Decision 16 of 4 January 1993 (S/AC.26/1992/16).

⁶⁴⁴ See e.g. *Velásquez Rodríguez (Compensatory Damages) Inter-Am.Ct.H.R., Series C, No. 7* (1990), para. 57. See also *Papamichalopoulos v. Greece (Article 50), E.C.H.R., Series A, No. 330-B* (1995), para. 39 where interest was payable only in respect of the pecuniary damage awarded. See further D. Shelton, *Remedies in International Human Rights Law* (Oxford, Clarendon Press, 1999), pp. 270-2.

⁶⁴⁵ See e.g. the Foreign Compensation (People’s Republic of China) Order 1987 (U.K.), s. 10, giving effect to a Settlement Agreement of 5 June 1987: *U.K.T.S. No. 37* (1987).

Some national court decisions have also dealt with issues of interest under international law,⁶⁴⁶ although more often questions of interest are dealt with as part of the law of the forum.

(7) Although the trend of international decisions and practice is towards greater availability of interest as an aspect of full reparation, an injured State has no automatic entitlement to the payment of interest. The awarding of interest depends on the circumstances of each case; in particular, on whether an award of interest is necessary in order to ensure full reparation. This approach is compatible with the tradition of various legal systems as well as the practice of international tribunals.

(8) An aspect of the question of interest is the possible award of compound interest. The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest. For example, the Iran-United States Claims Tribunal has consistently denied claims for compound interest, including in cases where the claimant suffered losses through compound interest charges on indebtedness associated with the claim. In *R.J. Reynolds Tobacco Co. v. Government of the Islamic Republic of Iran*, the Tribunal failed to find ...

“any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, ‘[t]here are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable’ ... Even though the term ‘all sums’ could be construed to include interest and thereby to allow compound interest, the Tribunal, due to the ambiguity of the language, interprets the clause in the light of the international rule just stated, and thus excludes compound interest.”⁶⁴⁷

Consistent with this approach the Tribunal has gone behind contractual provisions appearing to provide for compound interest, in order to prevent the claimant gaining a profit “wholly out of proportion to the possible loss that [it] might have incurred by not having the amounts

⁶⁴⁶ See, e.g., *McKesson Corporation v. Islamic Republic of Iran*, 116 F. Supp. 2d 13 (District Court, D.C., 2000).

⁶⁴⁷ (1984) 7 *Iran-U.S.C.T.R.* 181, at pp. 191-2, citing Whiteman, *Damages*, vol. III, p. 1997.

due at its disposal”.⁶⁴⁸ The preponderance of authority thus continues to support the view expressed by Arbitrator Huber in the *British Claims in the Spanish Zone of Morocco* case:

“the arbitral case law in matters involving compensation of one State for another for damages suffered by the nationals of one within the territory of the other ... is unanimous ... in disallowing compound interest. In these circumstances, very strong and quite specific arguments would be called for to grant such interest ...”⁶⁴⁹

The same is true for compound interest in respect of State-to-State claims.

(9) Nonetheless several authors have argued for a reconsideration of this principle, on the ground that “compound interest reasonably incurred by the injured party should be recoverable as an item of damage”.⁶⁵⁰ This view has also been supported by arbitral tribunals in some cases.⁶⁵¹ But given the present state of international law it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation.

(10) The actual calculation of interest on any principal sum payable by way of reparation raises a complex of issues concerning the starting date (date of breach,⁶⁵² date on which payment

⁶⁴⁸ *Anaconda-Iran, Inc. v. Government of the Islamic Republic of Iran*, (1986) 13 *Iran-U.S.C.T.R.* 199, at p. 235. See also G. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996) pp. 477-478.

⁶⁴⁹ *UNRIAA*, vol. II, p. 615 (1924), at p. 650. Cf. the *Aminoil* arbitration, where the interest awarded was compounded for a period without any reason being given. This accounted for more than half of the total final award: *Government of Kuwait v. American Independent Oil Co.*, (1982) *I.L.R.*, vol. 66, p. 519, at p. 613, para. 178 (5).

⁶⁵⁰ E.g., F.A. Mann, “Compound Interest as an Item of Damage in International Law”, in *Further Studies in International Law* (Oxford, Clarendon Press, 1990) p. 377 at p. 383.

⁶⁵¹ See e.g. *Compañía des Desarrollo de Santa Elena SA v. Republic of Costa Rica*, I.C.S.I.D. Case No. ARB/96/1, final award of 1 February 2000, paras. 103-105.

⁶⁵² Using the date of the breach as the starting date for calculation of the interest term is problematic as there may be difficulties in determining that date, and many legal systems require a demand for payment by the claimant before interest will run. The date of formal demand was taken as the relevant date in the *Russian Indemnity* case, *UNRIAA*, vol. XI, p. 421 (1912), at p. 442, by analogy from the general position in European legal systems. In any event, failure to make a timely claim for payment is relevant in deciding whether to allow interest.

should have been made, date of claim or demand), the terminal date (date of settlement agreement or award, date of actual payment) as well as the applicable interest rate (rate current in the respondent State, in the applicant State, international lending rates). There is no uniform approach, internationally, to questions of quantification and assessment of amounts of interest payable.⁶⁵³ In practice the circumstances of each case and the conduct of the parties strongly affect the outcome. There is wisdom in the Iran-United States Claims Tribunal's observation that such matters, if the parties cannot resolve them, must be left "to the exercise ... of the discretion accorded to [individual tribunals] in deciding each particular case".⁶⁵⁴ On the other hand the present unsettled state of practice makes a general provision on the calculation of interest useful. Accordingly article 38 indicates that the date from which interest is to be calculated is the date when the principal sum should have been paid. Interest runs from that date until the date the obligation to pay is fulfilled. The interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act.

(11) Where a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery. A capital sum cannot be earning interest *and* notionally employed in earning profits at one and the same time. However, interest may be due on the profits which would have been earned but which have been withheld from the original owner.

⁶⁵³ See e.g. J.Y. Gotanda, *Supplemental Damages in Private International Law* (The Hague, Kluwer, 1998), p. 13. It should be noted that a number of Islamic countries, influenced by the *Shari'a*, prohibit payment of interest under their own law or even under their constitution. However, they have developed alternatives to interest in the commercial and international context. For example payment of interest is prohibited by the Iranian Constitution, Principles 43, 49, but the Guardian Council has held that this injunction does not apply to "foreign governments, institutions, companies and persons, who, according to their own principles of faith, do not consider [interest] as being prohibited ..." See *ibid.* pp. 39-40, with references.

⁶⁵⁴ *Islamic Republic of Iran v. United States of America (Case No. A19)*, (1987) 16 *Iran-US C.T.R.* 285, at p. 290.

(12) Article 38 does not deal with post-judgment or moratory interest. It is only concerned with interest that goes to make up the amount that a court or tribunal should award, i.e. compensatory interest. The power of a court or tribunal to award post-judgement interest is a matter of its procedure.

Article 39

Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

Commentary

(1) Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but where the injured State, or the individual victim of the breach, has materially contributed to the damage by some wilful or negligent act or omission. Its focus is on situations which in national law systems are referred to as “contributory negligence”, “comparative fault”, “faute de la victime”, etc.⁶⁵⁵

(2) Article 39 recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. This is consonant with the principle that full reparation is due for the injury - but nothing more - arising in consequence of the internationally wrongful act. It is also consistent with fairness as between the responsible State and the victim of the breach.

(3) In the *LaGrand* case, the International Court recognized that the conduct of the claimant State could be relevant in determining the form and amount of reparation. There Germany had delayed in asserting that there had been a breach and in instituting proceedings. The Court noted “that Germany may be criticized for the manner in which these proceedings were filed and for their timing”, and stated that it would have taken this factor, among others, into account “had Germany’s submission included a claim for indemnification”.⁶⁵⁶

⁶⁵⁵ See C. von Bar, *The Common European Law of Torts, Volume Two* (Munich, Beck, 2000), pp. 517-540.

⁶⁵⁶ *LaGrand (Germany v. United States of America)*, Merits, judgment of 27 June 2001, paras. 57, 116. For the relevance of delay in terms of loss of the right to invoke responsibility see article 45 (b) and commentary.

(4) The relevance of the injured State's contribution to the damage in determining the appropriate reparation is widely recognized in the literature⁶⁵⁷ and in State practice.⁶⁵⁸ While questions of an injured State's contribution to the damage arise most frequently in the context of compensation, the principle may also be relevant to other forms of reparation. For example, if a State-owned ship is unlawfully detained by another State and while under detention sustains damage attributable to the negligence of the captain, the responsible State may be required merely to return the ship in its damaged condition.

(5) Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights.⁶⁵⁹ While the notion of a negligent action or omission is not qualified, e.g., by a requirement that the negligence should have reached the level of being "serious" or "gross", the relevance of any negligence to reparation

⁶⁵⁷ See, e.g., B. Graefrath, "Responsibility and Damage Caused: relations between responsibility and damages", in *Recueil des cours*, vol. 185 (1984-II), p. 95; B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973), pp. 265-300.

⁶⁵⁸ In the *Delagoa Bay Railway (Great Britain, USA/Portugal)* case, the arbitrators noted that: "All the circumstances that can be adduced against the concessionaire company and for the Portuguese Government mitigate the latter's liability and warrant ... a reduction in reparation": ((1900), Martens, *Nouveau Recueil*, 2nd series, vol. XXX, p. 329; Moore, *International Arbitrations*, vol. II, p. 1865 (1900)). In *The S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1*, p. 31, a question arose as to whether there had been any contribution to the injury suffered as a result of the ship harbouring at Kiel for some time, following refusal of passage through the Kiel Canal, before taking an alternative course. The Court implicitly acknowledged that the captain's conduct could affect the amount of compensation payable, although it held that the captain had acted reasonably in the circumstances. For other examples see C.D. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), p. 23.

⁶⁵⁹ This terminology is drawn from Article VI (1) of the Convention on the International Liability for Damage caused by Space Objects, United Nations, *Treaty Series*, vol. 961, p. 187.

will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case.⁶⁶⁰ The phrase “account shall be taken” indicates that the article deals with factors that are capable of affecting the form or reducing the amount of reparation in an appropriate case.

(6) The wilful or negligent action or omission which contributes to the damage may be that of the injured State or “any person or entity in relation to whom reparation is sought”. This phrase is intended to cover not only the situation where a State claims on behalf of one of its nationals in the field of diplomatic protection, but also any other situation in which one State invokes the responsibility of another State in relation to conduct primarily affecting some third party. Under articles 42 and 48, a number of different situations can arise where this may be so. The underlying idea is that the position of the State seeking reparation should not be more favourable, so far as reparation in the interests of another is concerned, than it would be if the person or entity in relation to whom reparation is sought were to bring a claim individually.

Chapter III

Serious breaches of obligations under peremptory norms of general international law

(1) Chapter III of Part Two is entitled “Serious Breaches of Obligations Under Peremptory Norms of General International Law”. It sets out certain consequences of specific types of breaches of international law, identified by reference to two criteria: first, they involve breaches of obligations under peremptory norms of general international law; second, the breaches concerned are in themselves serious, having regard to their scale or character. Chapter III contains two articles, the first defining its scope of application (article 40), the second spelling out the legal consequences entailed by the breaches coming within the scope of the chapter (article 41).

⁶⁶⁰ It is possible to envisage situations where the injury in question is entirely attributable to the conduct of the victim and not at all to that of the “responsible” State. Such situations are covered by the general requirement of proximate cause referred to in article 31, rather than by article 39. On questions of mitigation of damage see commentary to article 31, para. (11).

(2) Whether a qualitative distinction should be recognized between different breaches of international law has been the subject of a major debate.⁶⁶¹ The issue was underscored by the International Court of Justice in the *Barcelona Traction* case, when it said that:

“an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”⁶⁶²

The Court was there concerned to contrast the position of an injured State in the context of diplomatic protection with the position of all States in respect of the breach of an obligation towards the international community as a whole. Although no such obligation was at stake in that case, the Court’s statement clearly indicates that for the purposes of State responsibility certain obligations are owed to the international community as a whole, and that by reason of “the importance of the rights involved” all States have a legal interest in their protection.

(3) On a number of subsequent occasions the Court has taken the opportunity to affirm the notion of obligations to the international community as a whole, although it has been cautious in applying it. In the *East Timor* case, the Court said that “Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable.”⁶⁶³ At the preliminary objections stage of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case,

⁶⁶¹ For full bibliographies see M. Spinedi, “Crimes of States: A Bibliography”, in J. Weiler, A. Cassese & M. Spinedi (eds.), *International Crimes of States* (Berlin/New York, De Gruyter, 1989), pp. 339-353 and N. Jørgensen, *The Responsibility of States for International Crimes* (Oxford, Oxford University Press, 2000) pp. 299-314.

⁶⁶² *Barcelona Traction, Light and Power Company, Limited, Second Phase*, I.C.J. Reports 1970, p. 3, at p. 32, para. 33. See M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford, Clarendon Press, 1997).

⁶⁶³ *East Timor (Portugal v. Australia)*, I.C.J. Reports 1995, p. 90, at p. 102, para. 29.

it stated that “the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*”.⁶⁶⁴ this finding contributed to its conclusion that its temporal jurisdiction over the claim was not limited to the time after which the parties became bound by the Convention.

(4) A closely related development is the recognition of the concept of peremptory norms of international law in articles 53 and 64 of the Vienna Convention on the Law of Treaties.⁶⁶⁵ These provisions recognize the existence of substantive norms of a fundamental character, such that no derogation from them is permitted even by treaty.⁶⁶⁶

(5) From the first it was recognized that these developments had implications for the secondary rules of State responsibility which would need to be reflected in some way in the Articles. Initially it was thought this could be done by reference to a category of “international crimes of State”, which would be contrasted with all other cases of internationally wrongful acts (“international delicts”).⁶⁶⁷ There has been, however, no development of penal consequences for States of breaches of these fundamental norms. For example, the award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms. In accordance with article 34 the function of damages is essentially compensatory.⁶⁶⁸ Overall it remains the case, as the International Military Tribunal said in 1946, that:

“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁶⁶⁹

⁶⁶⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996*, p. 595, at p. 616, para. 31.

⁶⁶⁵ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

⁶⁶⁶ See article 26 and commentary.

⁶⁶⁷ See *Yearbook ... 1976*, vol. II Part 2, pp. 95-122, especially paras. 6-34. See also commentary to article 12, para. (5).

⁶⁶⁸ See commentary to article 36, paragraph (4).

⁶⁶⁹ International Military Tribunal for the Trial of the Major War Criminals, judgment of 1 October 1946, reprinted in *A.J.I.L.*, vol. 41 (1947), p. 172, at p. 221.

(6) In line with this approach, despite the trial and conviction by the Nuremburg and Tokyo Military Tribunals of individual government officials for criminal acts committed in their official capacity, neither Germany nor Japan were treated as “criminal” by the instruments creating these tribunals.⁶⁷⁰ As to more recent international practice, a similar approach underlies the establishment of the ad hoc tribunals for Yugoslavia and Rwanda by the United Nations Security Council. Both tribunals are concerned only with the prosecution of individuals.⁶⁷¹ In its decision relating to a *subpoena duces tecum* in *Prosecutor v Blaskić*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia stated that “[u]nder present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems.”⁶⁷² The Rome Statute for an International Criminal Court of 17 July 1998 likewise establishes jurisdiction over the “most serious crimes of concern to the international community as a whole”, but limits this jurisdiction to “natural persons” (art. 25 (1)). The same article specifies that no provision of the Statute “relating to individual criminal responsibility shall affect the responsibility of States under international law”.⁶⁷³

⁶⁷⁰ This despite the fact that the London Charter of 1945 specifically provided for the condemnation of a “group or organization” as “criminal”, cf. Charter of the International Military Tribunal, London, United Nations, *Treaty Series*, vol. 82, p. 279, arts. 9, 10.

⁶⁷¹ See respectively arts. 1, 6 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993 (originally published as an Annex to S/25704 and Add.1, approved by the Security Council by Resolution 827 (1993); amended 13 May 1998 by Resolution 1166 (1998) and 30 November 2000 by Resolution 1329 (2000)); and arts. 1, 7 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for such Violations Committed in the Territory of Neighbouring States, 8 November 1994, approved by the Security Council by Resolution 955 (1994).

⁶⁷² Case IT-95-14-AR 108 *bis*, *Prosecutor v. Blaskić*, *I.L.R.*, vol. 110, p. 688 (1997), at p. 698, para. 25. Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, *I.C.J. Reports 1996*, p. 595, in which neither of the parties treated the proceedings as being criminal in character. See also the commentary to article 12, para. (6).

⁶⁷³ Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, art. 25 (4). See also art. 10: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”

(7) Accordingly the present Articles do not recognize the existence of any distinction between State “crimes” and “delicts” for the purposes of Part One. On the other hand, it is necessary for the Articles to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility. Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which the International Court has given of obligations towards the international community as a whole⁶⁷⁴ all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the Vienna Convention⁶⁷⁵ involve obligations to the international community as a whole. But there is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance - i.e., in terms of the present Articles, in being entitled to invoke the responsibility of any State in breach. Consistently with the difference in their focus, it is appropriate to reflect the consequences of the two concepts in two distinct ways. First, serious

⁶⁷⁴ According to the International Court of Justice, obligations *erga omnes* “derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”: *Barcelona Traction, Light and Power Company, Limited, Second Phase*, I.C.J. Reports 1970, p. 3, at p. 32, para. 34. See also *East Timor (Portugal v. Australia)*, I.C.J. Reports 1995, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996, p. 226, at p. 258, para. 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, I.C.J. Reports 1996, p. 595, at pp. 615-616, paras. 31-32.

⁶⁷⁵ The International Law Commission gave the following examples of treaties which would violate the article due to conflict with a peremptory norm of general international law, or a rule of *jus cogens*: “(a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (b) a treaty contemplating the performance of any other act criminal under international law, and (c) a treaty contemplating or conniving at the commission of such acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to cooperate ... treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples”: *Yearbook ... 1966*, vol. II, p. 248.

breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible State but for all other States. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole. The first of these propositions is the concern of the present chapter; the second is dealt with in article 48.

Article 40

Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Commentary

- (1) Article 40 serves to define the scope of the breaches covered by the chapter. It establishes two criteria in order to distinguish “serious breaches of obligations under peremptory norms of general international law” from other types of breaches. The first relates to the character of the obligation breached, which must derive from a peremptory norm of general international law. The second qualifies the intensity of the breach, which must have been serious in nature. Chapter III only applies to those violations of international law that fulfil both criteria.
- (2) The first criterion relates to the character of the obligation breached. In order to give rise to the application of this chapter, a breach must concern an obligation arising under a peremptory norm of general international law. In accordance with article 53 of the Vienna Convention on the Law of Treaties,⁶⁷⁶ a peremptory norm of general international law is one which is ...

“accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

The concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine.⁶⁷⁷

⁶⁷⁶ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

(3) It is not appropriate to set out examples of the peremptory norms referred to in the text of article 40 itself, any more than it was in the text of article 53 of the Vienna Convention. The obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.

(4) Among these prohibitions, it is generally agreed that the prohibition of aggression is to be regarded as peremptory. This is supported, for example, by the Commission's commentary to what was to become article 53,⁶⁷⁸ uncontradicted statements by Governments in the course of the Vienna Conference,⁶⁷⁹ the submissions of both parties in *Military and Paramilitary Activities* and the Court's own position in that case.⁶⁸⁰ There also seems to be widespread agreement with other examples listed in the Commission's commentary to article 53: viz., the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid. These practices have been prohibited in widely ratified international treaties and conventions admitting of no exception. There was general agreement among governments as to the peremptory character of these prohibitions at the Vienna Conference. As to the peremptory character of the prohibition against genocide, this is supported by a number of decisions by national and international courts.⁶⁸¹

⁶⁷⁷ For further discussion of the requirements for identification of a norm as peremptory see commentary to article 26, para. (5), with selected references to the case-law and literature.

⁶⁷⁸ *Yearbook ... 1966*, vol. II, p. 247.

⁶⁷⁹ In the course of the Vienna conference, a number of Governments characterized as peremptory the prohibitions against aggression and the illegal use of force: see *United Nations Conference on the Law of Treaties, First Session*, A/CONF. 39/11, pp. 294, 296-7, 300, 301, 302, 303, 304, 306, 307, 311, 312, 318, 320, 322, 323-4, 326.

⁶⁸⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14, at pp. 100-1, para. 190. See also President Nagendra Singh, *ibid.*, at p. 153.

⁶⁸¹ See, for example, the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, I.C.J. Reports 1993, p. 325, at pp. 439-440; *Counter-Claims*, I.C.J. Reports 1997, p. 243; the District Court of Jerusalem in *Attorney-General of the Government of Israel v. Eichmann*, (1961) I.L.R., vol. 36, p. 5.

- (5) Although not specifically listed in the Commission's commentary to article 53 of the Vienna Convention, the peremptory character of certain other norms seems also to be generally accepted. This applies to the prohibition against torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.⁶⁸² The peremptory character of this prohibition has been confirmed by decisions of international and national bodies.⁶⁸³ In the light of the International Court's description of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory.⁶⁸⁴ Finally, the obligation to respect the right of self-determination deserves to be mentioned. As the International Court noted in the *East Timor* case, "[t]he principle of self-determination ... is one of the essential principles of contemporary international law", which gives rise to an obligation to the international community as a whole to permit and respect its exercise.⁶⁸⁵
- (6) It should be stressed that the examples given above may not be exhaustive. In addition, article 64 of the Vienna Convention contemplates that new peremptory norms of general international law may come into existence through the processes of acceptance and recognition by the international community of States as a whole, as referred to in article 53. The examples given here are thus without prejudice to existing or developing rules of international law which fulfil the criteria for peremptory norms under article 53.

⁶⁸² *United Nations, Treaty Series*, vol. 1465, p. 112.

⁶⁸³ Cf. the U.S. Court of Appeals, 2nd Circuit, in *Siderman de Blake v. Argentina*, (1992) *I.L.R.*, vol. 103, p. 455, at p. 471; the United Kingdom Court of Appeal in *Al Adsani v. Government of Kuwait*, (1996) *I.L.R.*, vol. 107, p. 536 at pp. 540-541; the United Kingdom House of Lords in *R. v. Bow Street Metropolitan Magistrate, ex parte Pinochet Ugarte (No. 3)*, [1999] 2 W.L.R. 827, at pp. 841, 881. Cf. the U.S. Court of Appeals, 2nd Circuit in *Filartiga v. Pena-Irala*, (1980), 630 F.2d 876, *I.L.R.*, vol. 77, p. 169, at pp. 177-179.

⁶⁸⁴ *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports* 1996, p. 226, at p. 257, para. 79.

⁶⁸⁵ *East Timor (Portugal v. Australia)*, *I.C.J. Reports* 1995, p. 90, at p. 102, para. 29. See Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the *United Nations*, G.A. Res. 2625 (XXV) of 24 October 1970, fifth principle.

(7) Apart from its limited scope in terms of the comparatively small number of norms which qualify as peremptory, article 40 applies a further limitation for the purposes of the chapter, viz. that the breach should itself have been “serious”. A “serious” breach is defined in paragraph 2 as one which involves “a gross or systematic failure by the responsible State to fulfil the obligation” in question. The word “serious” signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach and it is not intended to suggest that any violation of these obligations is not serious or is somehow excusable. But relatively less serious cases of breach of peremptory norms can be envisaged, and it is necessary to limit the scope of this chapter to the more serious or systematic breaches. Some such limitation is supported by State practice. For example, when reacting against breaches of international law, States have often stressed their systematic, gross, or egregious nature. Similarly, international complaint procedures, for example in the field of human rights, attach different consequences to systematic breaches, e.g. in terms of the non-applicability of the rule of exhaustion of local remedies.⁶⁸⁶

(8) To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term “gross” refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations, and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.⁶⁸⁷

⁶⁸⁶ See *Ireland v. United Kingdom*, *E.C.H.R., Series A, No. 25* (1978), para. 159; cf. e.g. the procedure established under ECOSOC resolution 1503 (XXVIII), which requires a “consistent pattern of gross violations of human rights”.

⁶⁸⁷ In 1976 the Commission proposed the following examples as cases denominated as “international crimes”:

“(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(9) Article 40 does not lay down any procedure for determining whether or not a serious breach has been committed. It is not the function of the Articles to establish new institutional procedures for dealing with individual cases, whether they arise under chapter III of Part Two or otherwise. Moreover the serious breaches dealt with in this chapter are likely to be addressed by the competent international organizations including the Security Council and the General Assembly. In the case of aggression, the Security Council is given a specific role by the Charter.

Article 41

Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

Commentary

- (1) Article 41 sets out the particular consequences of breaches of the kind and gravity referred to in article 40. It consists of three paragraphs. The first two prescribe special legal obligations of States faced with the commission of “serious breaches” in the sense of article 40, the third takes the form of a saving clause.
- (2) Pursuant to paragraph 1 of article 41, States are under a positive duty to cooperate in order to bring to an end serious breaches in the sense of article 40. Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.”

(*Yearbook ... 1976*, vol. II, Part Two, pp. 95-96).

form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation.

(3) Neither does paragraph 1 prescribe what measures States should take in order to bring an end to serious breaches in the sense of article 40. Such cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation.

It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. But in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy. Paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response to the serious breaches referred to in article 40.

(4) Pursuant to paragraph 2 of article 41, States are under a duty of abstention, which comprises two obligations, first, not to recognize as lawful situations created by serious breaches in the sense of article 40, and, second, not to render aid or assistance in maintaining that situation.

(5) The first of these two obligations refers to the obligation of collective non-recognition by the international community as a whole of the legality of situations resulting directly from serious breaches in the sense of article 40.⁶⁸⁸ The obligation applies to “situations” created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples. It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.

(6) The existence of an obligation of non-recognition in response to serious breaches of obligations arising under peremptory norms already finds support in international practice and in

⁶⁸⁸ This has been described as “an essential legal weapon in the fight against grave breaches of the basic rules of international law”: C. Tomuschat, “International Crimes by States: An Endangered Species?”, in K. Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (The Hague, Nijhoff, 1998), p. 253 at p. 259.

decisions of the International Court of Justice. The principle that territorial acquisitions brought about by the use of force are not valid and must not be recognized found a clear expression during the Manchurian crisis of 1931-1932, when the Secretary of State, Henry Stimson, declared that the United States of America - joined by a large majority of members of the League of Nations - would not ...

“admit the legality of any situation de facto nor ... recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the ... sovereignty, the independence or the territorial and administrative integrity of the Republic of China, ... [nor] recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928.”⁶⁸⁹

The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations affirms this principle by stating unequivocally that States shall not recognize as legal any acquisition of territory brought about by the use of force.⁶⁹⁰ As the International Court of Justice held in *Military and Paramilitary Activities*, the unanimous consent of States to this declaration “may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.”⁶⁹¹

(7) An example of the practice of non-recognition of acts in breach of peremptory norms is provided by the reaction of the Security Council to the Iraqi invasion of Kuwait in 1990. Following the Iraqi declaration of a “comprehensive and eternal merger” with Kuwait, the Security Council in Resolution 662 (1990), decided that the annexation had “no legal validity, and is considered null and void”, and called upon all States, international organizations and

⁶⁸⁹ Secretary of State’s note to the Chinese and Japanese Governments, in Hackworth, Digest, vol. I, p. 334; endorsed by Assembly Resolutions of 11 March 1932, *League of Nations Official Journal*, March 1932, Special Supplement No. 101, p. 87. For a review of earlier practice relating to collective non-recognition see J. Dugard, *Recognition and the United Nations* (Cambridge, Grotius, 1987), pp. 24-27.

⁶⁹⁰ G.A. Res. 2625 (XXV), first principle, para. 10.

⁶⁹¹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14, at p. 100, para. 188.

specialized agencies not to recognize that annexation and to refrain from any action or dealing that might be interpreted as a recognition of it, whether direct or indirect. In fact no State recognized the legality of the purported annexation, the effects of which were subsequently reversed.

(8) As regards the denial by a State of the right of self-determination of peoples, the International Court's advisory opinion on *Namibia (South West Africa)* is similarly clear in calling for a non-recognition of the situation.⁶⁹² The same obligations are reflected in Security Council and General Assembly resolutions concerning the situation in Rhodesia⁶⁹³ and the Bantustans in South Africa.⁶⁹⁴ These examples reflect the principle that where a serious breach in the sense of article 40 has resulted in a situation that might otherwise call for recognition, this has nonetheless to be withheld. Collective non-recognition would seem to be a prerequisite for any concerted community response against such breaches and marks the minimum necessary response by States to the serious breaches referred to in article 40.

(9) Under article 41 (2), no State shall recognize the situation created by the serious breach as lawful. This obligation applies to all States, including the responsible State. There have been cases where the responsible State has sought to consolidate the situation it has created by its own "recognition". Evidently the responsible State is under an obligation not to recognize or sustain the unlawful situation arising from the breach. Similar considerations apply even to the injured State: since the breach by definition concerns the international community as a whole, waiver or recognition induced from the injured State by the responsible State cannot preclude the

⁶⁹² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, p. 16, at p. 56, para. 126, where the Court held that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law".

⁶⁹³ Cf. S.C. Res. 216 (1965).

⁶⁹⁴ See e.g. G.A. Res. 31/6A (1976), endorsed by S.C. Res. 402 (1976); G.A. Res. 32/105N (1977); G.A. Res. 34/93G (1979); see also the statements issued by the respective presidents of the United Nations Security Council in reaction to the "creation" of Venda and Ciskei: S/13549, 21 September 1979; S/14794, 15 December 1981.

international community interest in ensuring a just and appropriate settlement. These conclusions are consistent with article 30 on cessation and are reinforced by the peremptory character of the norms in question.⁶⁹⁵

(10) The consequences of the obligation of non-recognition are, however, not unqualified. In the *Namibia (South West Africa)* advisory opinion the Court, despite holding that the illegality of the situation was opposable *erga omnes* and could not be recognized as lawful even by States not members of the United Nations, said that:

“the non-recognition of South Africa’s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.”⁶⁹⁶

Both the principle of non-recognition and this qualification to it have been applied, for example, by the European Court of Human Rights.⁶⁹⁷

(11) The second obligation contained in paragraph 2 prohibits States from rendering aid or assistance in maintaining the situation created by a serious breach in the sense of article 40. This goes beyond the provisions dealing with aid or assistance in the commission of an internationally wrongful act, which are covered by article 16. It deals with conduct “after the fact” which assists the responsible State in maintaining a situation “opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law”.⁶⁹⁸

⁶⁹⁵ See also the commentary to article 20, paragraph (7) and the commentary to article 45, paragraph (4).

⁶⁹⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, p. 16, at p. 56, para. 125.

⁶⁹⁷ *Loizidou v. Turkey, Merits*, E.C.H.R. Reports 1996-VI, p. 2216; *Cyprus v. Turkey* (Application no. 25781/94), judgement of 10 May 2001, paras. 89-98.

⁶⁹⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, p. 16, at p. 56, para. 126.

It extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach, and it applies whether or not the breach itself is a continuing one. As to the elements of “aid or assistance”, article 41 is to be read in connection with article 16. In particular, the concept of aid or assistance in article 16 presupposes that the State has “knowledge of the circumstances of the internationally wrongful act”. There is no need to mention such a requirement in article 41 (2) as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State.

(12) In some respects, the prohibition contained in paragraph 2 may be seen as a logical extension of the duty of non-recognition. However, it has a separate scope of application insofar as actions are concerned which would not imply recognition of the situation created by serious breaches in the sense of article 40. This separate existence is confirmed, for example, in the Security Council’s resolutions prohibiting any aid or assistance in maintaining the illegal apartheid regime in South Africa or Portuguese colonial rule.⁶⁹⁹ Just as in the case of the duty of non-recognition, these resolutions would seem to express a general idea applicable to all situations created by serious breaches in the sense of article 40.

(13) Pursuant to paragraph 3, article 41 is without prejudice to the other consequences elaborated in Part Two and to possible further consequences that a serious breach in the sense of article 40 may entail. The purpose of this paragraph is twofold. First, it makes it clear that a serious breach in the sense of article 40 entails the legal consequences stipulated for all breaches in chapter I and II of Part Two. Consequently, a serious breach in the sense of article 40 gives rise to an obligation, on behalf of the responsible State, to cease the wrongful act, to continue performance and, if appropriate, to give guarantees and assurances of non-repetition. By the same token, it entails a duty to make reparation in conformity with the rules set out in chapter II of this Part. The incidence of these obligations will no doubt be affected by the gravity of the breach in question, but this is allowed for in the actual language of the relevant articles.

(14) Secondly, paragraph 3 allows for such further consequences of a serious breach as may be provided for by international law. This may be done by the individual primary rule, as in the case of the prohibition of aggression. Paragraph 3 accordingly allows that international law may recognize additional legal consequences flowing from the commission of a serious breach in the

⁶⁹⁹ Cf. e.g. S.C. Res. 218 (1965) on the Portuguese colonies and S.C. Res. 418 (1977) and 569 (1985) on South Africa.

sense of article 40. The fact that such further consequences are not expressly referred to in chapter III does not prejudice their recognition in present-day international law, or their further development. In addition, paragraph 3 reflects the conviction that the legal regime of serious breaches is itself in a state of development. By setting out certain basic legal consequences of serious breaches in the sense of article 40, article 41 does not intend to preclude the future development of a more elaborate regime of consequences entailed by such breaches.

PART THREE

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Part Three deals with the implementation of State responsibility, i.e. with giving effect to the obligations of cessation and reparation which arise for a responsible State under Part Two by virtue of its commission of an internationally wrongful act. Although State responsibility arises under international law independently of its invocation by another State, it is still necessary to specify what other States faced with a breach of an international obligation may do, what action they may take in order to secure the performance of the obligations of cessation and reparation on the part of the responsible State. This, sometimes referred to as the *mise-en-oeuvre* of State responsibility, is the subject matter of Part Three. Part Three consists of two chapters. Chapter I deals with the invocation of State responsibility by other States and with certain associated questions. Chapter II deals with countermeasures taken in order to induce the responsible State to cease the conduct in question and to provide reparation.

Chapter I

Invocation of the responsibility of a State

(1) Part One of the Articles identifies the internationally wrongful act of a State generally in terms of the breach of any international obligation of that State. Part Two defines the consequences of internationally wrongful acts in the field of responsibility as obligations of the responsible State, not as rights of any other State person or entity. Part Three is concerned with the implementation of State responsibility, i.e., with the entitlement of other States to invoke the international responsibility of the responsible State and with certain modalities of such invocation. The rights that other persons or entities may have arising from a breach of an international obligation are preserved by article 33 (2).

(2) Central to the invocation of responsibility is the concept of the injured State. This is the State whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act. This concept is introduced in article 42 and various consequences are drawn from it in other articles of this chapter. In keeping with the broad range of international obligations covered by the Articles, it is necessary to recognize that a broader range of States may have a legal interest in invoking responsibility and ensuring compliance with the obligation in question. Indeed in certain situations, all States may have such an interest, even though none of them is individually or specially affected by the breach.⁷⁰⁰ This possibility is recognized in article 48. Articles 42 and 48 are couched in terms of the entitlement of States to invoke the responsibility of another State. They seek to avoid problems arising from the use of possibly misleading terms such as “direct” versus “indirect” injury or “objective” versus “subjective” rights.

(3) Although article 42 is drafted in the singular (“an injured State”), more than one State may be injured by an internationally wrongful act and be entitled to invoke responsibility as an injured State. This is made clear by article 46. Nor are articles 42 and 48 mutually exclusive. Situations may well arise in which one State is “injured” in the sense of article 42, and other States are entitled to invoke responsibility under article 48.

(4) Chapter I also deals with a number of related questions: the requirement of notice if a State wishes to invoke the responsibility of another (article 43), certain aspects of the admissibility of claims (article 44), loss of the right to invoke responsibility (article 45), and cases where the responsibility of more than one State may be invoked in relation to the same internationally wrongful act (article 47).

(5) Reference must also be made to article 55, which makes clear the residual character of the Articles. In addition to giving rise to international obligations for States, special rules may also determine which other State or States are entitled to invoke the international responsibility arising from their breach, and what remedies they may seek. This was true, for example, of article 396 of

⁷⁰⁰ Cf. the International Court of Justice’s statement that “all States can be held to have a legal interest” as concerns breaches of obligations *erga omnes*: *Barcelona Traction, Light and Power Company, Limited, Second Phase*, *I.C.J. Reports 1970*, p. 3, at p. 32, para. 33, cited in commentary to Part Two, chapter III, para. (2).

the Treaty of Versailles of 1919, which was the subject of the decision in *The S.S. Wimbledon*.⁷⁰¹ It is also true of article 33 of the European Convention of Human Rights. It will be a matter of interpretation in each case whether such provisions are intended to be exclusive, i.e. to apply as a *lex specialis*.

Article 42

Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) That State individually; or
- (b) A group of States including that State, or the international community as a whole, and the breach of the obligation:
 - (i) Specially affects that State; or
 - (ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Commentary

(1) Article 42 provides that the implementation of State responsibility is in the first place an entitlement of the “injured State”. It defines this term in a relatively narrow way, drawing a distinction between injury to an individual State or possibly a small number of States and the legal interests of several or all States in certain obligations established in the collective interest. The latter are dealt with in article 48.

(2) This chapter is expressed in terms of the invocation by a State of the responsibility of another State. For this purpose, invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these Articles, protest as such is not an invocation of responsibility; it has a variety of

⁷⁰¹ 1923, *P.C.I.J., Series A, No. 1*. Four States there invoked the responsibility of Germany, at least one of which, Japan, had no specific interest in the voyage of the *S.S. Wimbledon*.

forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal,⁷⁰² or even the taking of countermeasures. In order to take such steps, i.e. to invoke responsibility in the sense of the Articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. a right of action specifically conferred by a treaty,⁷⁰³ or it must be considered an injured State. The purpose of article 42 is to define this latter category.

(3) A State which is injured in the sense of article 42 is entitled to resort to all means of redress contemplated in the Articles. It can invoke the appropriate responsibility pursuant to Part Two. It may also - as is clear from the opening phrase of article 49 - resort to countermeasures in accordance with the rules laid down in chapter II of this Part. The situation of an injured State should be distinguished from that of any other State which may be entitled to invoke responsibility, e.g. under article 48 which deals with the entitlement to invoke responsibility in some shared general interest. This distinction is clarified by the opening phrase of article 42, "A State is entitled as an injured State to invoke the responsibility ...".

(4) The definition in article 42 is closely modelled on article 60 of the Vienna Convention on the Law of Treaties,⁷⁰⁴ although the scope and purpose of the two provisions is different. Article 42 is concerned with any breach of an international obligation of whatever character,

⁷⁰² An analogous distinction is drawn by art. 27 (2) of the Washington Convention of 1965 (Convention on the Settlement of Investment Disputes between States and Nationals of Other States, United Nations, *Treaty Series*, vol. 575, p. 159), which distinguishes between the bringing of an international claim in the field of diplomatic protection and "informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute".

⁷⁰³ In relation to article 42, such a treaty right could be considered a *lex specialis*: see article 55 and commentary.

⁷⁰⁴ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

whereas article 60 is concerned with breach of treaties. Moreover article 60 is concerned exclusively with the right of a State party to a treaty to invoke a material breach of that treaty by another party as grounds for its suspension or termination. It is not concerned with the question of responsibility for breach of the treaty.⁷⁰⁵ This is why article 60 is restricted to “material” breaches of treaties. Only a material breach justifies termination or suspension of the treaty, whereas in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity. Despite these differences, the analogy with article 60 is justified. Article 60 seeks to identify the States parties to a treaty which are entitled to respond individually and in their own right to a material breach by terminating or suspending it. In the case of a bilateral treaty the right can only be that of the other State party, but in the case of a multilateral treaty article 60 (2) does not allow every other State to terminate or suspend the treaty for material breach. The other State must be specially affected by the breach, or at least individually affected in that the breach necessarily undermines or destroys the basis for its own further performance of the treaty.

(5) In parallel with the cases envisaged in article 60 of the Vienna Convention on the Law of Treaties, three cases are identified in article 42. In the first case, in order to invoke the responsibility of another State as an injured State, a State must have an individual right to the performance of an obligation, in the way that a State party to a bilateral treaty has vis-à-vis the other State party (subparagraph (a)). Secondly, a State may be specially affected by the breach of an obligation to which it is a party, even though it cannot be said that the obligation is owed to it individually (subparagraph (b) (i)). Thirdly, it may be the case that performance of the obligation by the responsible State is a necessary condition of its performance by all the other States (subparagraph (b) (ii)); this is the so-called “integral” or “interdependent” obligation.⁷⁰⁶ In each of these cases, the possible suspension or termination of the obligation or of its performance by the injured State may be of little value to it as a remedy. Its primary interest may be in the restoration of the legal relationship by cessation and reparation.

⁷⁰⁵ Cf., Vienna Convention, *ibid.*, art. 73.

⁷⁰⁶ The notion of “integral” obligations was developed by Fitzmaurice as Special Rapporteur on the Law of Treaties: see *Yearbook ... 1957*, vol. II, p. 54. The term has sometimes given rise to confusion, being used to refer to human rights or environmental obligations which are not owed on an “all or nothing” basis. The term “interdependent obligations” may be more appropriate.

(6) Pursuant to subparagraph (a) of article 42, a State is “injured” if the obligation breached was owed to it individually. The expression “individually” indicates that in the circumstances, performance of the obligation was owed to that State. This will necessarily be true of an obligation arising under a bilateral treaty between the two States parties to it, but it will also be true in other cases, e.g. of a unilateral commitment made by one State to another. It may be the case under a rule of general international law: thus, for example, rules concerning the non-navigational uses of an international river which may give rise to individual obligations as between one riparian State and another. Or it may be true under a multilateral treaty where particular performance is incumbent under the treaty as between one State party and another. For example, the obligation of the receiving State under article 22 of the Vienna Convention on Diplomatic Relations⁷⁰⁷ to protect the premises of a mission is owed to the sending State. Such cases are to be contrasted with situations where performance of the obligation is owed generally to the parties to the treaty at the same time and is not differentiated or individualized. It will be a matter for the interpretation and application of the primary rule to determine into which of the categories an obligation comes. The following discussion is illustrative only.

(7) An obvious example of cases coming within the scope of subparagraph (a) is a bilateral treaty relationship. If one State violates an obligation the performance of which is owed specifically to another State, the latter is an “injured State” in the sense of article 42. Other examples include binding unilateral acts by which one State assumes an obligation vis-à-vis another State; or the case of a treaty establishing obligations owed to a third State not party to the treaty.⁷⁰⁸ If it is established that the beneficiaries of the promise or the stipulation in favour of a third State were intended to acquire actual rights to performance of the obligation in question, they will be injured by its breach. Another example is a binding judgment of an international court or tribunal imposing obligations on one State party to the litigation for the benefit of the other party.⁷⁰⁹

⁷⁰⁷ Vienna Convention on Diplomatic Relations, United Nations, *Treaty Series*, vol. 500, p. 95.

⁷⁰⁸ Cf. Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 36.

⁷⁰⁹ See e.g. art. 59 of the Statute of the International Court of Justice.

(8) In addition, subparagraph (a) is intended to cover cases where the performance of an obligation under a multilateral treaty or customary international law is owed to one particular State. The scope of subparagraph (a) in this respect is different from that of article 60 (1) of the Vienna Convention on the Law of Treaties, which relies on the formal criterion of bilateral as compared with multilateral treaties. But although a multilateral treaty will characteristically establish a framework of rules applicable to all the States parties, in certain cases its performance in a given situation involves a relationship of a bilateral character between two parties. Multilateral treaties of this kind have often been referred to as giving rise to “bundles of bilateral relations”.⁷¹⁰

(9) The identification of one particular State as injured by a breach of an obligation under the Vienna Convention on Diplomatic Relations does not exclude that all States parties may have an interest of a general character in compliance with international law and in the continuation of international institutions and arrangements which have been built up over the years. In the *Diplomatic and Consular Staff* case, after referring to the “fundamentally unlawful character” of Iran’s conduct in participating in the detention of the diplomatic and consular personnel, the Court drew ...

“the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the

⁷¹⁰ See e.g. K. Sachariew, “State Responsibility for Multilateral Treaty Violations: Identifying the ‘Injured State’ and its Legal Status”, *Netherlands International Law Review*, vol. 35 (1988), p. 273, at pp. 277-8; B. Simma, “Bilateralism and Community Interest in the Law of State Responsibility”, in Y. Dinstein (ed.), *International Law in a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (London, Nijhoff, 1989), p. 821, at p. 823; C. Annacker, “The Legal Régime of *Erga Omnes* Obligations”, *Austrian Journal of Public International Law*, vol. 46 (1993-94), p. 131, at p. 136; D.N. Hutchinson, “Solidarity and Breaches of Multilateral Treaties”, *B.Y.I.L.*, vol. 59 (1988), p. 151, at pp. 154-5.

present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.”⁷¹¹

(10) Although discussion of multilateral obligations has generally focused on those arising under multilateral treaties, similar considerations apply to obligations under rules of customary international law. For example, the rules of general international law governing the diplomatic or consular relations between States establish bilateral relations between particular receiving and sending States, and violations of these obligations by a particular receiving State injure the sending State to whom performance was owed in the specific case.

(11) Subparagraph (b) deals with injury arising from violations of collective obligations, i.e. obligations that apply between more than two States and whose performance in the given case is not owed to one State individually, but to a group of States or even the international community as a whole. The violation of these obligations only injures any particular State if additional requirements are met. In using the expression “group of States”, article 42 (b) does not imply that the group has any separate existence or that it has separate legal personality. Rather the term is intended to refer to a group of States, consisting of all or a considerable number of States in the world or in a given region, which have combined to achieve some collective purpose and which may be considered for that purpose as making up a community of States of a functional character.

(12) Subparagraph (b) (i) stipulates that a State is injured if it is “specially affected” by the violation of a collective obligation. The term “specially affected” is taken from article 60 (2) (b) of the Vienna Convention on the Law of Treaties. Even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States. For example a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the States parties to the 1982 Convention in the preservation of the marine

⁷¹¹ *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at p. 43, para. 92.

environment, those coastal States parties should be considered as injured by the breach. Like article 60 (2) (b) of the Vienna Convention, subparagraph (b) (i) does not define the nature or extent of the special impact that a State must have sustained in order to be considered “injured”. This will have to be assessed on a case by case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a State to be considered injured it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.

(13) In contrast, subparagraph (b) (ii) deals with a special category of obligations, breach of which must be considered as affecting per se every other State to which the obligation is owed. Article 60 (2) (c) of the Vienna Convention on the Law of Treaties recognizes an analogous category of treaties, viz., those “of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations”. Examples include a disarmament treaty,⁷¹² a nuclear free zone treaty, or any other treaty where each parties’ performance is effectively conditioned upon and requires the performance of each of the others. Under article 60 (2) (c), any State party to such a treaty may terminate or suspend it in its relations not merely with the responsible State but generally in its relations with all the other parties.

(14) Essentially the same considerations apply to obligations of this character for the purposes of State responsibility. The other States parties may have no interest in termination or suspension of such obligations as distinct from continued performance, and they must all be considered as individually entitled to react to a breach. This is so whether or not any one of them is particularly affected; indeed they may all be equally affected, and none may have suffered quantifiable damage for the purposes of article 36. They may nonetheless have a strong interest in cessation and in other aspects of reparation, in particular restitution. For example, if one State party to the Antarctic Treaty claims sovereignty over an unclaimed area of Antarctica contrary to article 4 of that Treaty, the other States parties should be considered as injured thereby and as entitled to seek cessation, restitution (in the form of the annulment of the claim) and assurances of non-repetition in accordance with Part Two.

⁷¹² The example given in the Commission’s commentary to what became art. 60: *Yearbook ... 1966*, vol. II, p. 255, para. (8).

(15) The Articles deal with obligations arising under international law from whatever source and are not confined to treaty obligations. In practice interdependent obligations covered by subparagraph (b) (ii) will usually arise under treaties establishing particular regimes. Even under such treaties it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other States involved, and it is desirable that this subparagraph be narrow in its scope. Accordingly a State is only considered injured under subparagraph (b) (ii) if the breach is of such a character as radically to affect the enjoyment of the rights or the performance of the obligations of all the other States to which the obligation is owed.

Article 43

Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.
2. The injured State may specify in particular:
 - (a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
 - (b) What form reparation should take in accordance with the provisions of Part Two.

Commentary

- (1) Article 43 concerns the modalities to be observed by an injured State in invoking the responsibility of another State. The article applies to the injured State as defined in article 42, but States invoking responsibility under article 48 must also comply with its requirements.⁷¹³
- (2) Although State responsibility arises by operation of law on the commission of an internationally wrongful act by a State, in practice it is necessary for an injured State and/or other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation through formal protest, consultations, etc. Moreover the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or acquiescence: this is dealt with in article 45.

⁷¹³ See article 48 (3) and commentary.

(3) Article 43 requires an injured State which wishes to invoke the responsibility of another State to give notice of its claim to that State. It is analogous to article 65 of the Vienna Convention on the Law of Treaties.⁷¹⁴ Notice under article 43 need not be in writing, nor is it a condition for the operation of the obligation to provide reparation. Moreover, the requirement of notification of the claim does not imply that the normal consequence of the non-performance of an international obligation is the lodging of a statement of claim. Nonetheless an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

(4) It is not the function of the Articles to specify in detail the form which an invocation of responsibility should take. In practice claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. In *Certain Phosphate Lands in Nauru*, Australia argued that Nauru's claim was inadmissible because it had "not been submitted within a reasonable time".⁷¹⁵ The Court referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to press reports that the claim had been mentioned by the new President of Nauru in his independence day speech, as well as, inferentially, in subsequent correspondence and discussions with Australian Ministers. However the Court also noted that ...

"It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to 'seek a sympathetic reconsideration of Nauru's position'." ⁷¹⁶

The Court summarized the communications between the parties as follows:

"The Court ... takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by

⁷¹⁴ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

⁷¹⁵ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, *I.C.J. Reports 1992*, p. 240, at p. 253, para. 31.

⁷¹⁶ *Ibid.*, at p. 254, para. 35.

Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time."⁷¹⁷

In the circumstances it was sufficient that the respondent State was aware of the claim as a result of communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence.

(5) When giving notice of a claim, an injured or interested State will normally specify what conduct in its view is required of the responsible State by way of cessation of any continuing wrongful act, and what form any reparation should take. Thus Subparagraph 2 (a) provides that the injured State may indicate to the responsible State what should be done in order to cease the wrongful act, if it is continuing. This indication is not, as such, binding on the responsible State. The injured State can only require the responsible State to comply with its obligations, and the legal consequences of an internationally wrongful act are not for the injured State to stipulate or define. But it may be helpful to the responsible State to know what would satisfy the injured State; this may facilitate the resolution of the dispute.

(6) Subparagraph 2 (b) deals with the question of the election of the form of reparation by the injured State. In general, an injured State is entitled to elect as between the available forms of reparation. Thus it may prefer compensation to the possibility of restitution, as Germany did in the *Factory at Chorzów* case,⁷¹⁸ or as Finland eventually chose to do in its settlement of the *Passage through the Great Belt* case.⁷¹⁹ Or it may content itself with declaratory relief,

⁷¹⁷ Ibid., at pp. 254-255, para. 36.

⁷¹⁸ As the Permanent Court noted in the *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, at p. 17, by that stage of the dispute, Germany was no longer seeking on behalf of the German companies concerned the return of the factory in question or of its contents.

⁷¹⁹ In the *Passage through the Great Belt (Finland v. Denmark), Provisional Measures, I.C.J. Reports 1991*, p. 12, the International Court did not accept Denmark's argument as to the impossibility of restitution if, on the merits, it was found that the construction of the bridge across the Great Belt would result in a violation of Denmark's international obligations. For the terms of the eventual settlement see M. Koskenniemi, "L'affaire du passage par le Grand-Belt", *A.F.D.I.*, vol. XXXVIII (1992), p. 905, at p. 940.

generally or in relation to a particular aspect of its claim. On the other hand, there are cases where a State may not, as it were, pocket compensation and walk away from an unresolved situation, for example one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. In particular, in so far as there are continuing obligations the performance of which are not simply matters for the two States concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations to a larger group of States or to the international community as a whole.

(7) In light of these limitations on the capacity of the injured State to elect the preferred form of reparation, article 43 does not set forth the right of election in an absolute form. Instead it provides guidance to an injured State as to what sort of information it may include in its notification of the claim or in subsequent communications.

Article 44

Admissibility of claims

The responsibility of a State may not be invoked if:

- (a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;
- (b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Commentary

(1) The present Articles are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals. Rather they define the conditions for establishing the international responsibility of a State and for the invocation of that responsibility by another State or States. Thus it is not the function of the Articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as litispendence or election as they may affect the jurisdiction of

one international tribunal vis-à-vis another.⁷²⁰ By contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place. Two such matters are dealt with in article 44: the requirements of nationality of claims and exhaustion of local remedies.

(2) Subparagraph (a) provides that the responsibility of a State may not be invoked other than in accordance with any applicable rule relating to the nationality of claims. As the Permanent Court said in the *Mavrommatis Palestine Concessions* case ...

“It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.”⁷²¹

Paragraph (a) does not attempt a detailed elaboration of the nationality of claims rule or of the exceptions to it. Rather, it makes it clear that the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable.⁷²²

(3) Subparagraph (b) provides that when the claim is one to which the rule of exhaustion of local remedies applies, the claim is inadmissible if any available and effective local remedy has not been exhausted. The paragraph is formulated in general terms in order to cover any case to which the exhaustion of local remedies rule applies, whether under treaty or general international law, and in spheres not necessarily limited to diplomatic protection.

⁷²⁰ For discussion of the range of considerations affecting jurisdiction and admissibility of international claims before courts see G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris, Pedone, 1967); G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, Grotius, 1986), vol. II, pp. 427-575; S. Rosenne, *The Law and Practice of the International Court, 1920-1996* (3rd edn.) (The Hague, Nijhoff, 1997), vol. II, “Jurisdiction”.

⁷²¹ 1924, *P.C.I.J., Series A, No. 2*, p. 12.

⁷²² Questions of nationality of claims will be dealt with in detail in the International Law Commission’s work on diplomatic protection. See first report of the Special Rapporteur for the topic “Diplomatic protection”, A/CN.4/506.

(4) The local remedies rule was described by a Chamber of the Court in the *ELSI* case as “an important principle of customary international law”.⁷²³ In the context of a claim brought on behalf of a corporation of the claimant State, the Chamber defined the rule succinctly in the following terms:

“for an international claim [sc. on behalf of individual nationals or corporations] to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success”.⁷²⁴

The Chamber thus treated the exhaustion of local remedies as being distinct, in principle, from “the merits of the case”.⁷²⁵

(5) Only those local remedies which are “available and effective” have to be exhausted before invoking the responsibility of a State. The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the

⁷²³ *Elettronica Sicula S.p.A. (ELSI)*, *I.C.J. Reports 1989*, p. 15, at p. 42, para. 50. See also *Interhandel, Preliminary Objections*, *I.C.J. Reports 1959*, p. 6, at p. 27. On the exhaustion of local remedies rule generally, see e.g. C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990); J. Chappez, *La règle de l'épuisement des voies de recours internes* (Paris, Pedone, 1972); K. Doebling, “Local Remedies, Exhaustion of”, in *Encyclopedia of Public International Law*, (R. Bernhardt, ed.) (Amsterdam, North Holland, 1995), vol. 3, pp. 238-242; G. Perrin, “La naissance de la responsabilité internationale et l'épuisement des voies de recours internes dans le projet d'articles de la C.D.I.”, *Festschrift für R. Bindstedt* (Bern, Stämpfli, 1980), p. 271. On the exhaustion of local remedies rule in relation to violations of human rights obligations, see e.g. A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge, Cambridge University Press, 1983); E. Wyler, *L'illicite et la condition des personnes privées* (Paris, Pedone, 1995), pp. 65-89.

⁷²⁴ *Elettronica Sicula*, *I.C.J. Reports 1989*, p. 15, at p. 46, para. 59.

⁷²⁵ *Ibid.*, at p. 48, para. 63.

local court would have to apply can lead only to the rejection of any appeal. Beyond this, article 44 (b) does not attempt to spell out comprehensively the scope and content of the exhaustion of local remedies rule, leaving this to the applicable rules of international law.⁷²⁶

Article 45

Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

- (a) The injured State has validly waived the claim;
- (b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Commentary

(1) Article 45 is analogous to article 45 of the Vienna Convention on the Law of Treaties concerning loss of the right to invoke a ground for invalidating or terminating a treaty. The article deals with two situations in which the right of an injured State or other States concerned to invoke the responsibility of a wrongdoing State may be lost: waiver and acquiescence in the lapse of the claim. In this regard the position of an injured State as referred to in article 42 and other States concerned with a breach needs to be distinguished. A valid waiver or settlement of the responsibility dispute between the responsible State and the injured State, or, if there is more than one, all the injured States, may preclude any claim for reparation. Positions taken by individual States referred to in article 48 will not have such an effect.

(2) Subparagraph (a) deals with the case where an the injured State has waived either the breach itself, or its consequences in terms of responsibility. This is a manifestation of the general principle of consent in relation to rights or obligations within the dispensation of a particular State.

(3) In some cases, the waiver may apply only to one aspect of the legal relationship between the injured State and the responsible State. For example, in the *Russian Indemnity* case, the Russian embassy had repeatedly demanded from Turkey a certain sum corresponding to the

⁷²⁶ The topic will be dealt with in detail in the International Law Commission's work on diplomatic protection. See Second report of the Special Rapporteur for the topic "Diplomatic protection", A/CN.4/514.

capital amount of a loan, without any reference to interest or damages for delay. Turkey having paid the sum demanded, the Tribunal held that this conduct amounted to the abandonment of any other claim arising from the loan.⁷²⁷

(4) A waiver is only effective if it is validly given. As with other manifestations of State consent, questions of validity can arise with respect to a waiver, for example, possible coercion of the State or its representative, or a material error as to the facts of the matter, arising perhaps from a misrepresentation of those facts by the responsible State. The use of the term “valid waiver” is intended to leave to the general law the question of what amounts to a valid waiver in the circumstances.⁷²⁸ Of particular significance in this respect is the question of consent given by an injured State following a breach of an obligation arising from a peremptory norm of general international law, especially one to which article 40 applies. Since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law.

(5) Although it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal. In *Certain Phosphate Lands in Nauru*, it was argued that the Nauruan authorities before independence had waived the rehabilitation claim by concluding an Agreement relating to the future of the phosphate industry as well as by statements made at the time of independence. As to the former, the record of negotiations showed that the question of waiving the rehabilitation claim had been raised and not accepted, and the Agreement itself was silent on the point. As to the latter, the relevant statements were unclear and equivocal. The Court held there had been no waiver, since the conduct in question “did not at any time effect a clear and unequivocal waiver of their claims”.⁷²⁹

⁷²⁷ *UNRIAA*, vol. XI, p. 421 (1912), at p. 446.

⁷²⁸ Cf. the position with respect to valid consent under article 20: see commentary to article 20, paras. (4)-(8).

⁷²⁹ *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 240, at p. 247, para. 13.

In particular the statements relied on “[n]otwithstanding some ambiguity in the wording ... did not imply any departure from the point of view expressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations”.⁷³⁰

(6) Just as it may explicitly waive the right to invoke responsibility, so an injured State may acquiesce in the loss of that right. Subparagraph (b) deals with the case where an injured State is to be considered as having by reason of its conduct validly acquiesced in the lapse of the claim. The article emphasizes *conduct* of the State, which could include, where applicable, unreasonable delay, as the determining criterion for the lapse of the claim. Mere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particular where the injured State does everything it can reasonably do to maintain its claim.

(7) The principle that a State may by acquiescence lose its right to invoke responsibility was endorsed by the International Court in *Certain Phosphate Lands in Nauru*, in the following passage:

“The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.”⁷³¹

In the *LaGrand* case, the International Court held the German application admissible even though Germany had taken legal action some years after the breach had become known to it.⁷³²

(8) One concern of the rules relating to delay is that additional difficulties may be caused to the respondent State due to the lapse of time, e.g., as concerns the collection and presentation of evidence. Thus in the *Stevenson* case and the *Gentini* case, considerations of procedural fairness

⁷³⁰ Ibid., at p. 250, para. 20.

⁷³¹ Ibid., at pp. 253-254, para. 32. The Court went on to hold that, in the circumstances of the case and having regard to the history of the matter, Nauru’s application was not inadmissible on this ground: *ibid.*, para. 36. It reserved for the merits any question of prejudice to the Respondent State by reason of the delay. See further commentary to article 13, para. (8).

⁷³² See *LaGrand (Germany v. United States of America), Provisional Measures*, I.C.J. Reports 1999, p. 9, and *LaGrand (Germany v. United States of America), Merits*, judgement of 27 June 2001, paras. 53-57.

to the respondent State were advanced.⁷³³ In contrast, the plea of delay has been rejected if, in the circumstances of a case, the respondent State could not establish the existence of any prejudice on its part, as where it has always had notice of the claim and was in a position to collect and preserve evidence relating to it.⁷³⁴

(9) Moreover, contrary to what may be suggested by the expression “delay”, international courts have not engaged simply in measuring the lapse of time and applying clear-cut time limits. No generally accepted time limit, expressed in terms of years has been laid down.⁷³⁵ The Swiss Federal Department in 1970 suggested a period of 20 to 30 years since the coming into existence of the claim.⁷³⁶ Others have stated that the requirements were more exacting for contractual claims than for non-contractual claims.⁷³⁷ None of the attempts to establish any precise or finite time limit for international claims in general has achieved acceptance.⁷³⁸ It would be very difficult to establish any single limit, given the variety of situations, obligations and conduct that may be involved.

⁷³³ See *Stevenson, UNRIAA*, vol. IX, p. 385 (1903); *Gentini*, *ibid.*, vol. X, p. 557 (1903).

⁷³⁴ See, e.g., *Tagliaferro*, *ibid.*, vol. X, p. 592 (1903), at p. 593; similarly the actual decision in *Stevenson*, *ibid.*, vol. IX, p. 385 (1903), at pp. 386-387.

⁷³⁵ In some cases time limits are laid down for specific categories of claims arising under specific treaties (e.g., the six-month time limit for individual applications under article 35 (1) of the European Convention on Human Rights) notably in the area of private law (e.g., in the field of commercial transactions and international transport). See United Nations Convention on the Limitation Period in the International Sale of Goods, New York, 14 June 1974, as amended by the Protocol of 11 April 1980: United Nations, *Treaty Series*, vol. 1511, p. 99. By contrast it is highly unusual for treaty provisions dealing with inter-State claims to be subject to any express time limits.

⁷³⁶ Communiqué of 29 December 1970, in *Schweizerisches Jahrbuch für Internationales Recht*, vol. 32 (1976), p. 153.

⁷³⁷ C. Fleischhauer, “Prescription”, in *Encyclopedia of Public International Law*, (R. Bernhardt, ed.) (Amsterdam, North Holland, 1995), vol. 3, p. 1105, at p. 1107.

⁷³⁸ A large number of international decisions stress the absence of general rules, and in particular of any specific limitation period measured in years. Rather the principle of delay is a matter of appreciation having regard to the facts of the given case. Besides *Certain Phosphate Lands in Nauru*, see e.g. *Gentini, UNRIAA*, vol. X, p. 551 (1903), at p. 561; the *Ambatielos* arbitration, (1956) *I.L.R.*, vol. 23, p. 306, at pp. 314-317.

(10) Once a claim has been notified to the respondent State, delay in its prosecution (e.g., before an international tribunal) will not usually be regarded as rendering it inadmissible.⁷³⁹ Thus in *Certain Phosphate Lands in Nauru*, the International Court held it to be sufficient that Nauru had referred to its claims in bilateral negotiations with Australia in the period preceding the formal institution of legal proceedings in 1989.⁷⁴⁰ In the *Tagliaferro* case, Umpire Ralston likewise held that despite the lapse of 31 years since the infliction of damage, the claim was admissible as it had been notified immediately after the injury had occurred.⁷⁴¹

(11) To summarize, a claim will not be inadmissible on grounds of delay unless the circumstances are such that the injured State should be considered as having acquiesced in the lapse of the claim or the respondent State has been seriously disadvantaged. International courts generally engage in a flexible weighing of relevant circumstances in the given case, taking into account such matters as the conduct of the respondent State and the importance of the rights involved. The decisive factor is whether the respondent State has suffered any prejudice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued. Even if there has been some prejudice, it may be able to be taken into account in determining the form or extent of reparation.⁷⁴²

Article 46

Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

⁷³⁹ For statements of the distinction between notice of claim and commencement of proceedings see, e.g., R. Jennings and A.D. Watts (eds.) *Oppenheim's International Law*, (9th edn.) (London, Longmans, 1992) vol. I, p. 527; C. Rousseau, *Droit international public* (Paris, Sirey, 1983), vol. V, p. 182.

⁷⁴⁰ *I.C.J. Reports 1992*, p. 240, at p. 250, para. 20.

⁷⁴¹ *Tagliaferro*, UNRIIAA., vol. X, p. 592 (1903), at p. 593.

⁷⁴² See article 39 and commentary.

Commentary

- (1) Article 46 deals with the situation of a plurality of injured States, in the sense defined in article 42. It states the principle that where there are several injured States, each of them may separately invoke the responsibility for the internationally wrongful act on its own account.
- (2) Several States may qualify as “injured” States under article 42. For example, all the States to which an interdependent obligation is owed within the meaning of article 42 (b) (ii) are injured by its breach. In a situation of a plurality of injured States each may seek cessation of the wrongful act if it is continuing, and claim reparation in respect of the injury to itself. This conclusion has never been doubted, and is implicit in the terms of article 42 itself.
- (3) It is by no means unusual for claims arising from the same internationally wrongful act to be brought by several States. For example in *The S.S. Wimbledon*, four States brought proceedings before the Permanent Court of International Justice under article 386 (1) of the Treaty of Versailles, which allowed “any interested Power” to apply in the event of a violation of the provisions of the Treaty concerning transit through the Kiel Canal. The Court noted that “each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags”. It held they were each covered by article 386 (1) “even though they may be unable to adduce a prejudice to any pecuniary interest”.⁷⁴³ In fact only France, representing the operator of the vessel, claimed and was awarded compensation. In the cases concerning the *Aerial Incident of 27 July 1955*, proceedings were commenced by the United States, the United Kingdom and Israel against Bulgaria concerning the destruction of an Israeli civil aircraft and the loss of lives involved.⁷⁴⁴ In the *Nuclear Tests* cases, Australia and New Zealand each claimed to be injured in various ways by the French conduct of atmospheric nuclear tests at Muraroa Atoll.⁷⁴⁵

⁷⁴³ 1923, *P.C.I.J., Series A, No. 1* at p. 20

⁷⁴⁴ The Court held that it lacked jurisdiction over the Israeli claim: *I.C.J. Reports 1959*, p. 127 after which the United Kingdom and United States claims were withdrawn. In its Memorial, Israel noted that there had been active coordination of the claims between the various claimant governments, and added: “One of the primary reasons for establishing coordination of this character from the earliest stage was to prevent, as far as possible, the Bulgarian Government being faced with double claims leading to the possibility of double damages.” *Aerial Incident of 27 July 1955. Pleadings, Oral Arguments, Documents*, p. 106.

⁷⁴⁵ See *Nuclear Tests (Australia v. France)*, *I.C.J. Reports 1974*, p. 253 at p. 256; *Nuclear Tests (New Zealand v. France)*, *I.C.J. Reports 1974*, p. 457 at p. 460.

(4) Where the States concerned do not claim compensation on their own account as distinct from a declaration of the legal situation, it may not be clear whether they are claiming as injured States or as States invoking responsibility in the common or general interest under article 48. Indeed, in such cases it may not be necessary to decide into which category they fall, provided it is clear that they fall into one or the other. Where there is more than one injured State claiming compensation on its own account or on account of its nationals, evidently each State will be limited to the damage actually suffered. Circumstances might also arise in which several States injured by the same act made incompatible claims. For example, one State may claim restitution whereas the other may prefer compensation. If restitution is indivisible in such a case and the election of the second State is valid, it may be that compensation is appropriate in respect of both claims.⁷⁴⁶ In any event, two injured States each claiming in respect of the same wrongful act would be expected to coordinate their claims so as to avoid double recovery. As the International Court pointed out in the *Reparations* opinion, “International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case”.⁷⁴⁷

Article 47

Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.
2. Paragraph 1:
 - (a) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;
 - (b) Is without prejudice to any right of recourse against the other responsible States.

⁷⁴⁶ CF. *Forests of Central Rhodope*, where the arbitrator declined to award restitution *inter alia* on the ground that not all the persons or entities interested in restitution had claimed: *UNRIAA*, vol. 3 p. 1405 (1993), at p. 1432.

⁷⁴⁷ *I.C.J. Reports 1949*, p. 174 at p. 186.

Commentary

- (1) Article 47 deals with the situation where there is a plurality of responsible States in respect of the same wrongful act. It states the general principle that in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.
- (2) Several States may be responsible for the same internationally wrongful act in a range of circumstances. For example two or more States might combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation. In that case the injured State can hold each responsible State to account for the wrongful conduct as a whole. Or two States may act through a common organ which carries out the conduct in question, e.g. a joint authority responsible for the management of a boundary river. Or one State may direct and control another State in the commission of the same internationally wrongful act by the latter, such that both are responsible for the act.⁷⁴⁸
- (3) It is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as “joint”, “joint and several” and “solidary” responsibility derive from different legal traditions⁷⁴⁹ and analogies must be applied with care. In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.⁷⁵⁰ In the application of that principle, however, the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them. It is to such cases that article 47 is addressed.

⁷⁴⁸ See article 17 and commentary.

⁷⁴⁹ For a comparative survey of internal laws on solidary or joint liability see J.A. Weir, “Complex Liabilities” in A. Tunc (ed.), *International Encyclopedia of Comparative Law* (Tübingen, Mohr, 1983), vol. XI, Torts, esp. pp. 43-44, sections 79-81.

⁷⁵⁰ See introductory commentary to Part One, chapter IV, paras. (1)-(5).

(4) In the *Certain Phosphate Lands in Nauru* case,⁷⁵¹ Australia, the sole respondent, had administered Nauru as a trust territory under the Trusteeship Agreement on behalf of the three States concerned. Australia argued that it could not be sued alone by Nauru, but only jointly with the other two States concerned. Australia argued that the two States were necessary parties to the case and that in accordance with the principle formulated in *Monetary Gold*,⁷⁵² the claim against Australia alone was inadmissible. It also argued that the responsibility of the three States making up the Administering Authority was “solidary” and that a claim could not be made against only one of them. The Court rejected both arguments. On the question of “solidary” responsibility it said:

“... Australia has raised the question whether the liability of the three States would be ‘joint and several’ (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This ... is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.”⁷⁵³

The Court was careful to add that its decision on jurisdiction “does not settle the question whether reparation would be due from Australia, if found responsible, for the whole or only for

⁷⁵¹ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, *I.C.J. Reports 1992*, p. 240.

⁷⁵² *Monetary Gold Removed from Rome in 1943*, *I.C.J. Reports 1954*, p. 19. See further commentary to article 16, para. (11).

⁷⁵³ *Certain Phosphate Lands in Nauru*, *I.C.J. Reports 1992*, p. 240, at p. 258-259, para. 48.

part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems ... and, in particular, the special role played by Australia in the administration of the Territory”.⁷⁵⁴

(5) The extent of responsibility for conduct carried on by a number of States is sometimes addressed in treaties.⁷⁵⁵ A well-known example is the Convention on the International Liability for Damage caused by Space Objects of 29 March 1972.⁷⁵⁶ Article IV (1) provides expressly for “joint and several liability” where damage is suffered by a third State as a result of a collision between two space objects launched by two States. In some cases liability is strict; in others it is based on fault. Article IV (2) provides:

“In all cases of joint and several liability referred to in paragraph 1 ... the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.”⁷⁵⁷

⁷⁵⁴ Ibid., at p. 262, para. 56. The case was subsequently withdrawn by agreement, Australia agreeing to pay by instalments an amount corresponding to the full amount of Nauru’s claim. Subsequently, the two other Governments agreed to contribute to the payments made under the settlement. See *I.C.J. Reports 1993*, p. 322, and for the Settlement Agreement of 10 August 1993, see United Nations, *Treaty Series*, vol. 1770, p. 379.

⁷⁵⁵ A special case is the responsibility of the European Union and its member States under “mixed agreements”, where the Union and all or some members are parties in their own name. See e.g. Annex IX to the United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, United Nations, *Treaty Series*, vol. 1833, p. 396. Generally on mixed agreements, see, e.g., A. Rosas, “Mixed Union – Mixed Agreements”, in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (The Hague, Kluwer, 1998), p. 125.

⁷⁵⁶ United Nations, *Treaty Series*, vol. 961, p. 187.

⁷⁵⁷ See also art. V (2), which provides for indemnification between States which are jointly and severally liable.

This is clearly a *lex specialis*, and it concerns liability for lawful conduct rather than responsibility in the sense of the present Articles.⁷⁵⁸ At the same time it indicates what a regime of “joint and several” liability might amount to so far as an injured State is concerned.

(6) According to paragraph 1 of article 47, where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.

(7) Under article 47 (1), where several States are each responsible for the same internationally wrongful act, the responsibility of each may be separately invoked by an injured State in the sense of article 42. The consequences that flow from the wrongful act, for example in terms of reparation, will be those which flow from the provisions of Part Two in relation to that State.

(8) Article 47 only addresses the situation of a plurality of responsible States in relation to the same internationally wrongful act. The identification of such an act will depend on the particular primary obligation, and cannot be prescribed in the abstract. Of course situations can also arise where several States by separate internationally wrongful conduct have contributed to cause the same damage. For example, several States might contribute to polluting a river by the separate discharge of pollutants. In the *Corfu Channel* incident, it appears that Yugoslavia actually laid the mines and would have been responsible for the damage they caused. The International Court held that Albania was responsible to the United Kingdom for the same damage on the basis that it knew or should have known of the presence of the mines and of the attempt by the British ships to exercise their right of transit, but failed to warn the ships.⁷⁵⁹ Yet it was not suggested that Albania’s responsibility for failure to warn was reduced, let alone

⁷⁵⁸ See the introductory commentary, para. 4 for the distinction between international responsibility for wrongful acts and international liability arising from lawful conduct.

⁷⁵⁹ *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 4, at pp. 22-23.

precluded, by reason of the concurrent responsibility of a third State. In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.

(9) The general principle set out in paragraph 1 of article 47 is subject to the two provisos set out in paragraph 2. Subparagraph (a) addresses the question of double recovery by the injured State. It provides that the injured State may not recover, by way of compensation, more than the damage suffered.⁷⁶⁰ This provision is designed to protect the responsible States, whose obligation to compensate is limited by the damage suffered. The principle is only concerned to ensure against the actual recovery of more than the amount of the damage. It would not exclude simultaneous awards against two or more responsible States, but the award would be satisfied so far as the injured State is concerned by payment in full made by any one of them.

(10) The second proviso, in subparagraph (b), recognizes that where there is more than one responsible State in respect of the same injury, questions of contribution may arise between them. This is specifically envisaged, for example, in articles IV (2) and V (2) of the 1972 Outer Space Liability Convention.⁷⁶¹ On the other hand, there may be cases where recourse by one responsible State against another should not be allowed. Subparagraph (b) does not address the question of contribution among several States which are responsible for the same wrongful act; it merely provides that the general principle stated in paragraph 1 is without prejudice to any right of recourse which one responsible State may have against any other responsible State.

Article 48

Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

⁷⁶⁰ Such a principle was affirmed, for example, by the Permanent Court in *Factory at Chorzów*, when it held that a remedy sought by Germany could not be granted “or the same compensation would be awarded twice over”. *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17*, at p. 59; see also *ibid.*, at pp. 45, 49.

⁷⁶¹ Convention on the International Liability for Damage caused by Space Objects, United Nations, *Treaty Series*, vol. 961, p. 187.

(b) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Commentary

(1) Article 48 complements the rule contained in article 42. It deals with the invocation of responsibility by States other than the injured State acting in the collective interest. A State which is entitled to invoke responsibility under article 48 is acting not in its individual capacity by reason of having suffered injury but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole. The distinction is underlined by the phrase “[a]ny State other than an injured State” in paragraph 1 of article 48.

(2) Article 48 is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of article 42. Indeed in respect of obligations to the international community as a whole, the International Court specifically said as much in its judgment in the *Barcelona Traction* case.⁷⁶² Although the Court noted that “all States can be held to have a legal interest in” the fulfilment of these rights, article 48 refrains from qualifying the position of the States identified in article 48, for example by referring to them as “interested States”. The term “legal interest” would not permit a distinction between articles 42 and 48, as injured States in the sense of article 42 also have legal interests.

⁷⁶² *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33.

(3) As to the structure of article 48, paragraph 1 defines the categories of obligations which give rise to the wider right to invoke responsibility. Paragraph 2 stipulates which forms of responsibility States other than injured States may claim. Paragraph 3 applies the requirements of invocation contained in articles 43, 44 and 45 to cases where responsibility is invoked under article 48 (1).

(4) Paragraph 1 refers to “[a]ny State other than an injured State”. In the nature of things all or many States will be entitled to invoke responsibility under article 48, and the term “[a]ny State” is intended to avoid any implication that these States have to act together or in unison. Moreover their entitlement will coincide with that of any injured State in relation to the same internationally wrongful act in those cases where a State suffers individual injury from a breach of an obligation to which article 48 applies.

(5) Paragraph 1 defines the categories of obligations the breach of which may entitle States other than the injured State to invoke State responsibility. A distinction is drawn between obligations owed to a group of States and established to protect a collective interest of the group (subparagraph (1) (a)), and obligations owed to the international community as a whole (subparagraph (1) (b)).⁷⁶³

(6) Under subparagraph (1) (a), States other than the injured State may invoke responsibility if two conditions are met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the State invoking responsibility belongs; and second, the obligation must have been established for the protection of a collective interest. The provision does not distinguish between different sources of international law; obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. Such obligations have sometimes been referred to as “obligations *erga omnes partes*”.

(7) Obligations coming within the scope of subparagraph (1) (a) have to be “collective obligations”, i.e. they must apply between a group of States and have been established in some collective interest.⁷⁶⁴ They might concern, for example, the environment or security of a region (e.g. a regional nuclear free zone treaty or a regional system for the protection of human rights). They are not limited to arrangements established only in the interest of the member States but

⁷⁶³ For the extent of responsibility for serious breaches of obligations to the international community as a whole see Part Two, chapter III and commentary.

⁷⁶⁴ See also commentary to article 42, para. (11).

would extend to agreements established by a group of States in some wider common interest.⁷⁶⁵ But in any event the arrangement must transcend the sphere of bilateral relations of the States parties. As to the requirement that the obligation in question protect a collective interest, it is not the function of the Articles to provide an enumeration of such interests. If they fall within subparagraph (1) (a), their principal purpose will be to foster a common interest, over and above any interests of the States concerned individually. This would include situations in which States, attempting to set general standards of protection for a group or people, have assumed obligations protecting non-State entities.⁷⁶⁶

(8) Under subparagraph (1) (b), States other than the injured State may invoke responsibility if the obligation in question was owed “to the international community as a whole”.⁷⁶⁷ The provision intends to give effect to the International Court’s statement in the *Barcelona Traction* case, where the Court drew “an essential distinction” between obligations owed to particular States and those owed “towards the international community as a whole”.⁷⁶⁸ With regard to the latter, the Court went on to state that “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”.

(9) While taking up the essence of this statement, the Articles avoid use of the term “obligations *erga omnes*”, which conveys less information than the Court’s reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty. Nor is it the function of the Articles to provide a list of those obligations which under existing international law are owed to the international community as a

⁷⁶⁵ In the *S.S. Wimbledon*, the Court noted “[t]he intention of the authors of the Treaty of Versailles to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind”: 1928, *P.C.I.J., Series A, No. 1*, at p. 23.

⁷⁶⁶ Art. 22 of the League of Nations Covenant, establishing the Mandate system, was a provision in the general interest in this sense, as were each of the Mandate agreements concluded in accordance with it. Cf., however, the much-criticized decision of the International Court in *South West Africa, Second Phase*, *I.C.J. Reports 1966*, p. 6, from which article 48 is a deliberate departure.

⁷⁶⁷ For the terminology “international community as a whole” see commentary to article 25, para. (18).

⁷⁶⁸ *Barcelona Traction, Light and Power Company, Limited, Second Phase*, *I.C.J. Reports 1970*, p. 3, at p. 32, para. 33, and see commentary to Part Two, chapter III, paras. (2)-(6).

whole. This would go well beyond the task of codifying the secondary rules of State responsibility, and in any event, such a list would be only of limited value, as the scope of the concept will necessarily evolve over time. The Court itself has given useful guidance: in its 1970 judgment it referred by way of example to “the outlawing of acts of aggression, and of genocide” and to “the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.⁷⁶⁹ In its judgment in the *East Timor* case, the Court added the right of self-determination of peoples to this list.⁷⁷⁰

(10) Each State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations. Whereas the category of collective obligations covered by subparagraph (1) (a) needs to be further qualified by the insertion of additional criteria, no such qualifications are necessary in the case of subparagraph (1) (b). All States are by definition members of the international community as a whole, and the obligations in question are by definition collective obligations protecting interests of the international community as such. Of course such obligations may at the same time protect the individual interests of States, as the prohibition of acts of aggression protects the survival of each State and the security of its people. Similarly, individual States may be specially affected by the breach of such an obligation, for example a coastal State specially affected by pollution in breach of an obligation aimed at protection of the marine environment in the collective interest.

(11) Paragraph 2 specifies the categories of claim which States may make when invoking responsibility under article 48. The list given in the paragraph is exhaustive, and invocation of responsibility under article 48 gives rise to a more limited range of rights as compared to those of injured States under article 42. In particular, the focus of action by a State under article 48 - such State not being injured in its own right and therefore not claiming compensation on its own account - is likely to be on the very question whether a State is in breach and on cessation if the breach is a continuing one. For example in *The S.S. Wimbledon*, Japan which had no economic interest in the particular voyage sought only a declaration, whereas France, whose national had

⁷⁶⁹ Ibid., at p. 32, para. 34.

⁷⁷⁰ *I.C.J. Reports 1995*, p. 90, at p. 102, para. 29.

to bear the loss, sought and was awarded damages.⁷⁷¹ In the *South West Africa* cases, Ethiopia and Liberia sought only declarations of the legal position.⁷⁷² In that case, as the Court itself pointed out in 1971, “the injured entity” was a people, viz. the people of South West Africa.⁷⁷³

(12) Under paragraph 2 (a), any State referred to in article 48 is entitled to request cessation of the wrongful act and, if the circumstances require assurances and guarantees of non-repetition under article 30. In addition, subparagraph 2 (b) allows such a State to claim from the responsible State reparation in accordance with the provisions of chapter II of Part Two. In case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution. In accordance with subparagraph 2 (b), such a claim must be made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached. This aspect of article 48 (2) involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake. In this context it may be noted that certain provisions, for example in various human rights treaties, allow invocation of responsibility by any State party. In those cases where they have been resorted to, a clear distinction has been drawn between the capacity of the applicant State to raise the matter and the interests of the beneficiaries of the obligation.⁷⁷⁴ Thus a State invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party. Where the injured party is a State, its government will be able authoritatively to represent that interest. Other cases may present greater difficulties, which the present Articles cannot solve.⁷⁷⁵ Paragraph 2 (b) can do no more than set out the general principle.

⁷⁷¹ 1928, *P.C.I.J., Series A, No. 1*, at p. 30.

⁷⁷² *South West Africa, Preliminary Objections, I.C.J. Reports 1962*, p. 319; *South West Africa, Second Phase, I.C.J. Reports 1966*, p. 6.

⁷⁷³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *I.C.J. Reports 1971*, p. 12, at p. 56, para. 127.

⁷⁷⁴ See e.g. the observations of the European Court of Human Rights in *Denmark v. Turkey, Friendly Settlement*, judgment of 5 April 2000, paras. 20, 23.

⁷⁷⁵ See also commentary to article 33, paras. (3)-(4).

(13) Subparagraph 2 (b) refers to the State claiming “[p]erformance of the obligation of reparation in accordance with the preceding articles”. This makes it clear that article 48 States may not demand reparation in situations where an injured State could not do so. For example a demand for cessation presupposes the continuation of the wrongful act; a demand for restitution is excluded if restitution itself has become impossible.

(14) Paragraph 3 subjects the invocation of State responsibility by States other than the injured State to the conditions that govern invocation by an injured State, specifically article 43 (notice of claim), 44 (admissibility of claims) and 45 (loss of the right to invoke responsibility). These articles are to be read as applicable equally, *mutatis mutandis*, to a State invoking responsibility under article 48.

Chapter II

Countermeasures

(1) This chapter deals with the conditions and limitations on the taking of countermeasures by an injured State. In other words, it deals with measures, which would otherwise be contrary to the international obligations of an injured State vis-à-vis the responsible State. They were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation. Countermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.

(2) It is recognized both by governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances.⁷⁷⁶ This is reflected in article 23 which deals with countermeasures in response to an internationally wrongful act in the context of the circumstances precluding wrongfulness. Like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States. Chapter II has as its aim to establish an operational system, taking into account the exceptional

⁷⁷⁶ For the substantial literature see the bibliographies in E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, N.Y., Transnational Publishers, 1984), pp. 179-189; O.Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford, Clarendon Press, 1988), pp. 37-41; L-A. Sicilianos, *Les réactions décentralisées à l'illicite* (Paris, L.D.G.J., 1990) pp. 501-525. P. Alland, *Justice privée et ordre juridique international: Etude théorique des contre-mesures au droit international publique*, (Paris, Pedone, 1994).

character of countermeasures as a response to internationally wrongful conduct. At the same time, it seeks to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds.

(3) As to terminology, traditionally the term “reprisals” was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach.⁷⁷⁷ More recently the term “reprisals” has been limited to action taken in time of international armed conflict; i.e., it has been taken as equivalent to belligerent reprisals. The term “countermeasures” covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter.⁷⁷⁸ Countermeasures are to be contrasted with retorsion, i.e. “unfriendly” conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act. Acts of retorsion may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargos of various kinds or withdrawal of voluntary aid programs. Whatever their motivation, so long as such acts are not incompatible with the international obligations of the States taking them towards the target State, they do not involve countermeasures and they fall outside the scope of the present Articles. The term “sanction” is also often used as equivalent to action taken against a State by a group of States or mandated by an international organization. But the term is imprecise: Chapter VII of the United Nations Charter refers only to “measures”, even though these can encompass a very wide range of acts, including the use of armed force.⁷⁷⁹ Questions concerning the use of force in international relations and of the legality of belligerent reprisals are governed by the relevant primary rules. On the other hand the Articles are concerned with countermeasures as referred to

⁷⁷⁷ See, e.g., E. de Vattel, *Le droit des gens ou principes de la loi naturelle* (1758, repr. Washington, Carnegie Institution, 1916), Bk. II, ch. XVIII, section 342.

⁷⁷⁸ See *Air Services Agreement of 27 March 1946 (United States v. France)*, UNRIIA, vol. XVIII, p. 416 (1979), at p. 416, para. 80; *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, p. 3, at p. 27, para. 53; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14, at p. 102, para. 201; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, at p. 55, para. 82.

⁷⁷⁹ Charter of the United Nations, Arts. 39, 41, 42.

in article 23. They are taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two. They are instrumental in character and are appropriately dealt with in Part Three as an aspect of the implementation of State responsibility.

(4) Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the Vienna Convention on the Law of Treaties. Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach.⁷⁸⁰ Countermeasures involve conduct taken in derogation from a subsisting treaty obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved.

(5) This chapter does not draw any distinction between what are sometimes called “reciprocal countermeasures” and other measures. That term refers to countermeasures which involve suspension of performance of obligations towards the responsible State “if such obligations correspond to, or are directly connected with, the obligation breached”.⁷⁸¹ There is no requirement that States taking countermeasures are limited to suspension of performance of the same or a closely related obligation.⁷⁸² A number of considerations support this conclusion. First, for some obligations, for example those concerning the protection of human rights, reciprocal countermeasures are inconceivable. The obligations in question have a non-reciprocal character and are not only due to other States but to the individuals themselves.⁷⁸³ Secondly, a limitation to reciprocal countermeasures assumes that the injured State will be in a position to impose the same or related measures as the responsible State, which may not be so.

⁷⁸⁰ Cf. Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, arts. 70, 73, and on the respective scope of the codified law of treaties and the law of State responsibility see introductory commentary to Part One, chapter V, paras. (3)-(7).

⁷⁸¹ See *Yearbook ... 1985*, vol. II, Part 1, p. 10.

⁷⁸² Contrast the exception of non-performance in the law of treaties, which is so limited: see introductory commentary to Part One, chapter V, para. (9).

⁷⁸³ Cf. *Ireland v. United Kingdom*, E.C.H.R., Ser. A No. 25 (1978).

The obligation may be a unilateral one or the injured State may already have performed its side of the bargain. Above all, considerations of good order and humanity preclude many measures of a reciprocal nature. This conclusion does not, however, end the matter. Countermeasures are more likely to satisfy the requirements of necessity and proportionality if they are taken in relation to the same or a closely related obligation, as in the *Air Services* arbitration.⁷⁸⁴

(6) This conclusion reinforces the need to ensure that countermeasures are strictly limited to the requirements of the situation and that there are adequate safeguards against abuse. Chapter II seeks to do this in a variety of ways. First, as already noted, it concerns only non-forcible countermeasures (article 50 (1) (a)). Secondly, countermeasures are limited by the requirement that they are directed at the responsible State and not at third parties (article 49 (1) and (2)). Thirdly, since countermeasures are intended as instrumental - in other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment - they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States (articles 49 (2) (3), 53). Fourthly, countermeasures must be proportionate (article 51). Fifthly, they must not involve any departure from certain basic obligations (article 50 (1)), in particular those under peremptory norms of general international law.

(7) This chapter also deals to some extent with the conditions of the implementation of countermeasures. In particular, countermeasures cannot affect any dispute settlement procedure which is in force between the two States and applicable to the dispute (article 50 (2) (a)). Nor can they be taken in such a way as to impair diplomatic or consular inviolability (article 50 (2) (b)). Countermeasures must be preceded by a demand by the injured State that the responsible State comply with its obligations under Part Two, must be accompanied by an offer to negotiate, and must be suspended if the internationally wrongful act has ceased and the dispute is submitted in good faith to a court or tribunal with the authority to make decisions binding on the parties (article 52 (3)).

(8) The focus of the chapter is on countermeasures taken by injured States as defined in article 42. Occasions have arisen in practice of countermeasures being taken by other States, in particular those identified in article 48, where no State is injured or else on behalf of and at the request of an injured State. Such cases are controversial and the practice is embryonic.

⁷⁸⁴ *UNRIAA*, vol. XVIII, p. 416 (1979).

This chapter does not purport to regulate the taking of countermeasures by States other than the injured State. It is, however, without prejudice to the right of any State identified in article 48 (1) to take lawful measures against a responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached (article 54).

(9) In common with other chapters of these Articles, the provisions on countermeasures are residual and may be excluded or modified by a special rule to the contrary (see article 55). Thus a treaty provision precluding the suspension of performance of an obligation under any circumstances will exclude countermeasures with respect to the performance of the obligation. Likewise a regime for dispute resolution to which States must resort in the event of a dispute, especially if (as with the WTO dispute settlement system) it requires an authorization to take measures in the nature of countermeasures in response to a proven breach.⁷⁸⁵

Article 49

Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Commentary

(1) Article 49 describes the permissible object of countermeasures taken by an injured State against the responsible State and places certain limits on their scope. Countermeasures may only be taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two, namely, to cease the internationally wrongful conduct, if it is

⁷⁸⁵ See WTO, Understanding on Rules and Procedures governing the Settlement of Disputes, arts. 1, 3 (7), 22.

continuing, and to provide reparation to the injured State.⁷⁸⁶ Countermeasures are not intended as a form of punishment for wrongful conduct but as an instrument for achieving compliance with the obligations of the responsible State under Part Two. The limited object and exceptional nature of countermeasures are indicated by the use of the word “only” in paragraph 1 of Article 49.

(2) A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the State taking the countermeasure. This point was clearly made by the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case, in the following passage:

“In order to be justifiable, a countermeasure must meet certain conditions ... In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State.”⁷⁸⁷

(3) Paragraph 1 of article 49 presupposes an objective standard for the taking of countermeasures, and in particular requires that the countermeasure be taken against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations of cessation and reparation. A State taking countermeasures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded. A State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own

⁷⁸⁶ For these obligations see articles 30 and 31 and commentaries.

⁷⁸⁷ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, at p. 55, para. 83. See also “*Naulilaa*” (*Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa*), UNRIIAA, vol. II, p. 1013 (1928), at p. 1027; “*Cysne*” (*Responsibility of Germany for acts committed subsequent to 31 July 1914 and before Portugal entered into the war*), *ibid.*, vol. II, p. 1035 (1930), at p. 1057. At the 1930 Hague Codification Conference, all States which responded on this point took the view that a prior wrongful act was an indispensable prerequisite for the adoption of reprisals; see League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (Doc. C.75.M.69.1929.V.), p. 128.

risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment.⁷⁸⁸ In this respect there is no difference between countermeasures and other circumstances precluding wrongfulness.⁷⁸⁹

(4) A second essential element of countermeasures is that they “must be directed against”⁷⁹⁰ a State which has committed an internationally wrongful act, and which has not complied with its obligations of cessation and reparation under Part Two of the present Articles.⁷⁹¹ The word “only” in paragraph 1 applies equally to the target of the countermeasures as to their purpose and is intended to convey that countermeasures may only be adopted against a State which is the author of the internationally wrongful act. Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third State. In that sense the effect of countermeasures in precluding wrongfulness is relative. It concerns the legal relations between the injured State and the responsible State.⁷⁹²

(5) This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties. For example, if the injured State suspends transit rights with the responsible State in accordance with this chapter, other parties, including third States, may be affected thereby. If they have no individual rights in the matter they cannot complain. Similarly

⁷⁸⁸ The Tribunal’s remark in the *Air Services* case, to the effect that “each State establishes for itself its legal situation vis-à-vis other States”, (*UNRIIA*, vol. XVIII, p. 416 (1979), at p. 443, para. 81) should not be interpreted in the sense that the United States would have been justified in taking countermeasures whether or not France was in breach of the Agreement. In that case the Tribunal went on to hold that the United States was actually responding to a breach of the Agreement by France, and that its response met the requirements for countermeasures under international law, in particular in terms of purpose and proportionality. The Tribunal did not decide that an unjustified belief by the United States as to the existence of a breach would have been sufficient.

⁷⁸⁹ See introductory commentary to Part One, chapter V, para. (8).

⁷⁹⁰ *Gabčíkovo-Nagymaros Project*, *I.C.J. Reports* 1997, p. 7, at pp. 55-56, para. 83.

⁷⁹¹ *Ibid.* In *Gabčíkovo-Nagymaros Project* the Court held that the requirement had been satisfied, in that Hungary was in continuing breach of its obligations under a bilateral treaty, and Czechoslovakia’s response was directed against it on that ground.

⁷⁹² On the specific question of human rights obligations see article 50 (1) (b) and commentary.

if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided.

(6) In taking countermeasures, the injured State effectively withholds performance for the time being of one or more international obligations owed by it to the responsible State, and paragraph 2 of article 49 reflects this element. Although countermeasures will normally take the form of the non-performance of a single obligation, it is possible that a particular measure may affect the performance of several obligations simultaneously. For this reason, paragraph 2 refers to “obligations” in the plural. For example, freezing of the assets of a State might involve what would otherwise be the breach of several obligations to that State under different agreements or arrangements. Different and coexisting obligations might be affected by the same act. The test is always that of proportionality, and a State which has committed an internationally wrongful act does not thereby make itself the target for any form or combination of countermeasures irrespective of their severity or consequences.⁷⁹³

(7) The phrase “for the time being” in paragraph 2 indicates the temporary or provisional character of countermeasures. Their aim is the restoration of a condition of legality as between the injured State and the responsible State, and not the creation of new situations which cannot be rectified whatever the response of the latter State to the claims against it.⁷⁹⁴ Countermeasures are taken as a form of inducement, not punishment: if they are effective in inducing the responsible State to comply with its obligations of cessation and reparation, they should be discontinued and performance of the obligation resumed.

(8) Paragraph 1 of article 49 refers to the obligations of the responsible State “under Part Two”. It is to ensuring the performance of these obligations that countermeasures are directed. In many cases the main focus of countermeasures will be to ensure cessation of a continuing wrongful act but they may also be taken to ensure reparation, provided the other conditions laid down in chapter II are satisfied. Any other conclusion would immunize from countermeasures a State responsible for an internationally wrongful act if the act had ceased,

⁷⁹³ See article 51 and commentary. In addition, the performance of certain obligations may not be withheld by way of countermeasures in any circumstances: see article 50 and commentary.

⁷⁹⁴ This notion is further emphasized by paragraph 3 and article 53 (termination of countermeasures).

irrespective of the seriousness of the breach or its consequences, or of the State's refusal to make reparation for it. In this context an issue arises whether countermeasures should be available where there is a failure to provide satisfaction as demanded by the injured State, given the subsidiary role this remedy plays in the spectrum of reparation.⁷⁹⁵ In normal situations, satisfaction will be symbolic or supplementary and it would be highly unlikely that a State which had ceased the wrongful act and tendered compensation to the injured State could properly be made the target of countermeasures for failing to provide satisfaction as well. This concern may be adequately addressed by the application of the notion of proportionality set out in article 51.⁷⁹⁶

(9) Paragraph 3 of article 49 is inspired by article 72 (2) of the Vienna Convention on the Law of Treaties, which provides that when a State suspends a treaty it must not, during the suspension, do anything to preclude the treaty from being brought back into force. By analogy, States should as far as possible choose countermeasures that are reversible. In the *Gabčíkovo-Nagymaros Project* case, the existence of this condition was recognized by the Court, although it found it was not necessary to pronounce on the matter. After concluding that “the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate”, the Court said:

“It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible.”⁷⁹⁷

However, the duty to choose measures that are reversible is not absolute. It may not be possible in all cases to reverse all of the effects of countermeasures after the occasion for taking them has ceased. For example, a requirement of notification of some activity is of no value after the activity has been undertaken. By contrast, inflicting irreparable damage on the responsible State could amount to punishment or a sanction for non-compliance, not a countermeasure as conceived in the Articles. The phrase “as far as possible” in paragraph 3 indicates that if the

⁷⁹⁵ See commentary to article 37, para. (1).

⁷⁹⁶ Similar considerations apply to assurances and guarantees of non-repetition. See article 30 (b) and commentary.

⁷⁹⁷ *Gabčíkovo-Nagymaros Project*, I.C.J. Reports 1997, p. 7, at pp. 56-57, para. 87.

injured State has a choice between a number of lawful and effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures.

Article 50

Obligations not affected by countermeasures

1. Countermeasures shall not affect:
 - (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
 - (b) Obligations for the protection of fundamental human rights;
 - (c) Obligations of a humanitarian character prohibiting reprisals;
 - (d) Other obligations under peremptory norms of general international law.
2. A State taking countermeasures is not relieved from fulfilling its obligations:
 - (a) Under any dispute settlement procedure applicable between it and the responsible State;
 - (b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Commentary

- (1) Article 50 specifies certain obligations the performance of which may not be impaired by countermeasures. An injured State is required to continue to respect these obligations in its relations with the responsible State, and may not rely on a breach by the responsible State of its obligations under Part Two to preclude the wrongfulness of any non-compliance with these obligations. So far as the law of countermeasures is concerned, they are sacrosanct.
- (2) The obligations dealt with in article 50 fall into two basic categories. Paragraph 1 deals with certain obligations which by reason of their character must not be the subject of countermeasures at all. Paragraph 2 deals with certain obligations relating in particular to the maintenance of channels of communication between the two States concerned, including machinery for the resolution of their disputes.

- (3) Paragraph 1 of article 50 identifies four categories of fundamental substantive obligations which may not be affected by countermeasures: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations, (b) obligations for the protection of fundamental human rights, (c) obligations of a humanitarian character prohibiting reprisals and (d) other obligations under peremptory norms of general international law.
- (4) Subparagraph (1) (a) deals with the prohibition of the threat or use of force as embodied in the United Nations Charter, including the express prohibition of the use of force in Article 2 (4). It excludes forcible measures from the ambit of permissible countermeasures under chapter II.
- (5) The prohibition of forcible countermeasures is spelled out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by which the General Assembly of the United Nations proclaimed that “States have a duty to refrain from acts of reprisal involving the use of force.”⁷⁹⁸ The prohibition is also consistent with prevailing doctrine as well as a number of authoritative pronouncements of international judicial⁷⁹⁹ and other bodies.⁸⁰⁰
- (6) Subparagraph (1) (b) provides that countermeasures may not affect obligations for the protection of fundamental human rights. In the “*Naulilaa*” arbitration, the Tribunal stated that a lawful countermeasure must be “limited by the requirements of humanity and the rules of good faith applicable in relations between States”.⁸⁰¹ The International Law Association in

⁷⁹⁸ General Assembly resolution 2625 (XXV) of 24 October 1970, first principle, para. 6. The Helsinki Final Act of 1 August 1975 also contains an explicit condemnation of forcible measures. Part of Principle II of the Declaration of Principles embodied in the first “Basket” of that Final Act reads: “Likewise [the participating States] will also refrain in their mutual relations from any act of reprisal by force.”

⁷⁹⁹ See esp. *Corfu Channel, Merits*, I.C.J. Reports 1949, p. 4, at p. 35; *Military and Paramilitary Activities in and against Nicaragua*, I.C.J. Reports 1986, p. 16, at p. 127, para. 249.

⁸⁰⁰ See, e.g., Security Council resolution 111 (1956), resolution 171 (1962), resolution 188 (1964), resolution 316 (1972), resolution 332 (1973), resolution 573 (1985) and resolution 1322 (2000). Also see General Assembly resolution 41/38 (20 November 1986).

⁸⁰¹ “*Naulilaa*” (*Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa*), UNRIIAA, vol. II, p. 1013 (1928), at p. 1026.

its 1934 resolution stated that in taking countermeasures a State must “abstain from any harsh measure which would be contrary to the laws of humanity or the demands of the public conscience”.⁸⁰² This has been taken further as a result of the development since 1945 of international human rights. In particular the relevant human rights treaties identify certain human rights which may not be derogated from even in time of war or other public emergency.⁸⁰³

(7) In its General Comment 8 (1997) the Committee on Economic, Social and Cultural Rights discussed the effect of economic sanctions on civilian populations and especially on children. It dealt both with the effect of measures taken by international organizations, a topic which falls outside the scope of the present Articles,⁸⁰⁴ as well as with measures imposed by individual States or groups of States. It stressed that “whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights”,⁸⁰⁵ and went on to state that:

“... it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country.”⁸⁰⁶

⁸⁰² *Annuaire de l'Institut de droit international*, vol. 38 (1934), p. 710.

⁸⁰³ See International Covenant on Civil and Political Rights, art. 4, United Nations, *Treaty Series*, vol. 999, p. 171; European Convention on Human Rights and Fundamental Freedoms, art. 15, United Nations, *Treaty Series*, vol. 213, p. 221; American Convention on Human Rights, art. 27, United Nations, *Treaty Series*, vol. 1144, p. 143.

⁸⁰⁴ See article 59 and commentary.

⁸⁰⁵ E/C.12/1997/8, 5 December 1997, para. 1.

⁸⁰⁶ *Ibid.*, para. 4.

Analogies can be drawn from other elements of general international law. For example, Additional Protocol I of 1977, article 54 (1) stipulates unconditionally that “[s]tarvation of civilians as a method of warfare is prohibited.”⁸⁰⁷ Likewise, the final sentence of article 1 (2) of the two United Nations Covenants on Human Rights states that “In no case may a people be deprived of its own means of subsistence”.⁸⁰⁸

(8) Subparagraph (1) (c) deals with the obligations of humanitarian law with regard to reprisals and is modelled on article 60 (5) of the Vienna Convention on the Law of Treaties.⁸⁰⁹ The subparagraph reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the 1929 Hague and 1949 Geneva Conventions and Additional Protocol I of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.⁸¹⁰

(9) Subparagraph (1) (d) prohibits countermeasures affecting obligations under peremptory norms of general international law. Evidently a peremptory norm, not subject to derogation as between two States even by treaty, cannot be derogated from by unilateral action in the form of countermeasures. Subparagraph (d) reiterates for the purposes of the present chapter the recognition in article 26 that the circumstances precluding wrongfulness elaborated in chapter V

⁸⁰⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), United Nations, *Treaty Series*, vol. 1125, p. 3. See also arts. 54 (2) (“objects indispensable to the survival of the civilian population”), 75. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), United Nations, *Treaty Series*, vol. 1125, p. 609, art. 4.

⁸⁰⁸ Art. 1 (2) of the International Covenant on Economic, Social and Cultural Rights, United Nations, *Treaty Series*, vol. 993, p. 3, and art. 1 (2) of the International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, p. 171.

⁸⁰⁹ Art. 60 (5) of the Vienna Convention on the Law of Treaties precludes a State from suspending or terminating for material breach any treaty provision “relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties”. This paragraph was added at the Vienna Conference on a vote of 88 votes in favour, none against and 7 abstentions.

⁸¹⁰ See K. J. Partsch, “Reprisals”, in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam, North Holland, 1986) vol. 4, p. 200, at pp. 203-204; S. Oeter, “Methods and Means of Combat”, in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford, Oxford University Press, 1995) p. 105, at pp. 204-207, paras. 476-479, with references to relevant provisions.

of Part One do not affect the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. The reference to “other” obligations under peremptory norms makes it clear that subparagraph (d) does not qualify the preceding subparagraphs, some of which also encompass norms of a peremptory character. In particular, subparagraphs (b) and (c) stand on their own. Subparagraph (d) allows for the recognition of further peremptory norms creating obligations which may not be the subject of countermeasures by an injured State.⁸¹¹

(10) States may agree between themselves on other rules of international law which may not be the subject of countermeasures, whether or not they are regarded as peremptory norms under general international law. This possibility is covered by the *lex specialis* provision in article 55 rather than by the exclusion of countermeasures under article 50 (1) (d). In particular a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject matter. This is the case, for example, with the European Union treaties, which have their own system of enforcement.⁸¹² Under the dispute settlement system of the WTO, the prior authorization of the Dispute Settlement Body is required before a Member can suspend concessions or other obligations under the WTO agreements in response to a failure of another Member to comply with recommendations and rulings of a WTO panel or the Appellate Body.⁸¹³ Pursuant to Article 23 of the WTO Dispute Settlement Understanding (DSU), Members seeking “the redress of a violation of obligations or other nullification or impairment of benefits” under the WTO agreements, “shall have recourse to, and abide by” the DSU rules and procedures. This has been construed both as an “exclusive dispute resolution clause” and as a clause “preventing WTO members from unilaterally resolving their disputes in

⁸¹¹ See commentary to article 40, paras. (4) to (6).

⁸¹² On the exclusion of unilateral countermeasures in E.U. law, see, for example, Cases 90 and 91/63, *Commission v. Luxembourg & Belgium* [1964] E.C.R. 625 at p. 631; Case 52/75, *Commission v. Italy* [1976] E.C.R. 277 at p. 284; Case 232/78, *Commission v. France* [1979] E.C.R. 2729; Case C-5/94, *R. v. M.A.F.F., ex parte Hedley Lomas (Ireland) Limited*, [1996] E.C.R. I-2553.

⁸¹³ See WTO Dispute Settlement Understanding, arts. 3.7, 22.

respect of WTO rights and obligations”.⁸¹⁴ To the extent that derogation clauses or other treaty provisions (e.g. those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are “intransgressible”,⁸¹⁵ they may entail the exclusion of countermeasures.

(11) In addition to the substantive limitations on the taking of countermeasures in paragraph 1 of article 50, paragraph 2 provides that countermeasures may not be taken with respect to two categories of obligations, viz. certain obligations under dispute settlement procedures applicable between it and the responsible State, and obligations with respect to diplomatic and consular inviolability. The justification in each case concerns not so much the substantive character of the obligation but its function in relation to the resolution of the dispute between the parties which has given rise to the threat or use of countermeasures.

(12) The first of these, contained in subparagraph (2) (a), applies to “any dispute settlement procedure applicable” between the injured State and the responsible State. This phrase refers only to dispute settlement procedures that are related to the dispute in question and not to other unrelated issues between the States concerned. For this purpose the dispute should be considered as encompassing both the initial dispute over the internationally wrongful act and the question of the legitimacy of the countermeasure(s) taken in response.

(13) It is a well-established principle that dispute settlement provisions must be upheld notwithstanding that they are contained in a treaty which is at the heart of the dispute and the continued validity or effect of which is challenged. As the International Court said in *Appeal Relating to the Jurisdiction of the ICAO Council* ...

“Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested.”⁸¹⁶

⁸¹⁴ See *United States - Sections 301-310 of the Trade Act of 1974*, Report of the Panel, 22 December 1999, WTO doc. WT/DS152/R, paras. 7.35-7.46.

⁸¹⁵ To use the synonym adopted by the International Court in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, p. 226, at p. 257, para. 79.

⁸¹⁶ *I.C.J. Reports 1972*, p. 46, at p. 53. See also S.M. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge, Grotius, 1987), pp. 13-59.

Similar reasoning underlies the principle that dispute settlement provisions between the injured and the responsible State and applicable to their dispute may not be suspended by way of countermeasures. Otherwise unilateral action would replace an agreed provision capable of resolving the dispute giving rise to the countermeasures. The point was affirmed by the International Court in the *Diplomatic and Consular Staff* case:

“In any event, any alleged violation of the Treaty [of Amity] by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes.”⁸¹⁷

(14) The second exception in subparagraph 2 (b) limits the extent to which an injured State may resort by way of countermeasures to conduct inconsistent with its obligations in the field of diplomatic or consular relations. An injured State could envisage action at a number of levels. To declare a diplomat *persona non grata*, to terminate or suspend diplomatic relations, to recall ambassadors in situations provided for in the Convention on Diplomatic Relations such acts do not amount to countermeasures in the sense of this chapter. At a second level, measures may be taken affecting diplomatic or consular privileges, not prejudicing the inviolability of diplomatic or consular personnel or of premises, archives and documents. Such measures may be lawful as countermeasures if the requirements of this chapter are met. On the other hand, the scope of prohibited countermeasures under article 50 (2) (b) is limited to those obligations which are designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents, premises, archives and documents in all circumstances, including armed conflict.⁸¹⁸ The same applies, *mutatis mutandis*, to consular officials.

(15) In the *Diplomatic and Consular Staff* case, the International Court stressed that “diplomatic law itself provides the necessary means of defence against, and sanction for, illicit

⁸¹⁷ *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at p. 28, para. 53.

⁸¹⁸ See, e.g. Vienna Convention on Diplomatic Relations, United Nations, *Treaty Series*, vol. 500, p. 95, arts. 22, 24, 29, 44, 45.

activities by members of diplomatic or consular missions”,⁸¹⁹ and it concluded that violations of diplomatic or consular immunities could not be justified even as countermeasures in response to an internationally wrongful act by the sending State. As the Court said:

“The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.”⁸²⁰

If diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations. The exclusion of any countermeasures infringing diplomatic and consular inviolability is thus justified on functional grounds. It does not affect the various avenues for redress available to the receiving State under the terms of the Vienna Conventions of 1961 and 1963.⁸²¹ On the other hand no reference need be made in article 50 (2) (b) to multilateral diplomacy. The representatives of States to international organizations are covered by the reference to diplomatic agents. As for officials of international organizations themselves, no retaliatory step taken by a host State to their detriment could qualify as a countermeasure since it would involve non-compliance not with an obligation owed to the responsible State but with an obligation owed to a third party, i.e. the international organization concerned.

⁸¹⁹ *I.C.J. Reports 1980*, p. 3, at p. 38, para. 83.

⁸²⁰ *Ibid.*, at p. 40, para. 86. Cf. Vienna Convention on Diplomatic Relations, art. 45 (a); Vienna Convention on Consular Relations, United Nations, *Treaty Series*, vol. 596, p. 261, art. 27 (1) (a) (premises, property and archives to be protected “even in case of armed conflict”).

⁸²¹ See Vienna Convention on Diplomatic Relations, arts. 9, 11, 26, 36 (2), 43 (b), 47 (2) (a); Vienna Convention on Consular Relations, arts. 10 (2), 12, 23, 25 (b), (c), 35 (3).

Article 51

Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Commentary

(1) Article 51 establishes an essential limit on the taking of countermeasures by an injured State in any given case, based on considerations of proportionality. It is relevant in determining what countermeasures may be applied and their degree of intensity. Proportionality provides a measure of assurance inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State taking such measures.

(2) Proportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence. According to the award in the “*Naulilaa*” case ...

“even if one were to admit that the law of nations does not require that the reprisal should be approximately in keeping with the offence, one should certainly consider as excessive and therefore unlawful reprisals out of all proportion to the act motivating them.”⁸²²

(3) In the *Air Services* arbitration,⁸²³ the issue of proportionality was examined in some detail. In that case there was no exact equivalence between France’s refusal to allow a change of gauge in London on flights from the west coast of the United States and the United States’ countermeasure which suspended Air France flights to Los Angeles altogether. The Tribunal

⁸²² “*Naulilaa*” (*Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa*), *UNRIIAA*, vol. II, p. 1013 (1928), at p. 1028.

⁸²³ *Air Services Agreement of 27 March 1946 (United States v. France)*, *ibid.*, vol. XVIII, p. 417 (1978).

nonetheless held the United States measures to be in conformity with the principle of proportionality because they “do not appear to be clearly disproportionate when compared to those taken by France”.⁸²⁴ In particular the majority said:

“It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach: this is a well-known rule ... It has been observed, generally, that judging the ‘proportionality’ of counter-measures is not an easy task and can at best be accomplished by approximation. In the Tribunal’s view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France. Neither Party has provided the Tribunal with evidence that would be sufficient to affirm or reject the existence of proportionality in these terms, and the Tribunal must be satisfied with a very approximative appreciation.”⁸²⁵

In that case the countermeasures taken were in the same field as the initial measures and concerned the same routes, even if they were rather more severe in terms of their economic effect on the French carriers than the initial French action.

⁸²⁴ Ibid., at p. 444, para. 83.

⁸²⁵ Ibid. M. Reuter, dissenting, accepted the Tribunal’s legal analysis of proportionality but suggested that there were “serious doubts on the proportionality of the counter-measures taken by the United States, which the Tribunal has been unable to assess definitively”. Ibid., at p. 448.

(4) The question of proportionality was again central to the appreciation of the legality of possible countermeasures taken by Czechoslovakia in the *Gabčíkovo-Nagymaros Project* case.⁸²⁶ The International Court, having accepted that Hungary's actions in refusing to complete the Project amounted to an unjustified breach of the 1977 Agreement, went on to say:

“In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question. In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:

‘[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others’...

Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well ...

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube - with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz - failed to respect the proportionality which is required by international law... The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate.”⁸²⁷

Thus the Court took into account the quality or character of the rights in question as a matter of principle and (like the Tribunal in the *Air Services* case) did not assess the question of proportionality only in quantitative terms.

⁸²⁶ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7.

⁸²⁷ Ibid., at p. 56, paras. 85, 87, citing *Territorial Jurisdiction of the International Commission of the River Oder*, 1929, P.C.I.J., Series A, No. 23, p. 27.

(5) In other areas of the law where proportionality is relevant (e.g. self-defence), it is normal to express the requirement in positive terms, even though, in those areas as well, what is proportionate is not a matter which can be determined precisely.⁸²⁸ The positive formulation of the proportionality requirement is adopted in article 51. A negative formulation might allow too much latitude, in a context where there is concern as to the possible abuse of countermeasures.

(6) Considering the need to ensure that the adoption of countermeasures does not lead to inequitable results, proportionality must be assessed taking into account not only the purely “quantitative” element of the injury suffered, but also “qualitative” factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Article 51 relates proportionality primarily to the injury suffered but “taking into account” two further criteria: the gravity of the internationally wrongful act, and the rights in question. The reference to “the rights in question” has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration.

(7) Proportionality is concerned with the relationship between the internationally wrongful act and the countermeasure. In some respects proportionality is linked to the requirement of purpose specified in article 49: a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in article 49. Proportionality is, however, a limitation even on measures which may be justified under article 49. In every case a countermeasure must be commensurate with the injury suffered, including the importance of the issue of principle involved and this has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance.

⁸²⁸ E. Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (Giuffrè, Milan, 2000).

Article 52

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:
 - (a) Call on the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;
 - (b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.
2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.
3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:
 - (a) The internationally wrongful act has ceased, and
 - (b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.
4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Commentary

- (1) Article 52 lays down certain procedural conditions relating to the resort to countermeasures by the injured State. Before taking countermeasures an injured State is required to call on the responsible State in accordance with article 43 to comply with its obligations under Part Two. The injured State is also required to notify the responsible State that it intends to take countermeasures and to offer to negotiate with that State. Notwithstanding this second requirement, the injured State may take certain urgent countermeasures to preserve its rights. If the responsible State has ceased the internationally wrongful act and the dispute is before a competent court or tribunal, countermeasures may not be taken; if already taken, they must be suspended. However this requirement does not apply if the responsible State fails to implement dispute settlement procedures in good faith. In such a case countermeasures do not have to be suspended and may be resumed.

(2) Overall, article 52 seeks to establish reasonable procedural conditions for the taking of countermeasures in a context where compulsory third party settlement of disputes may not be available, immediately or at all.⁸²⁹ At the same time it needs to take into account the possibility that there may be an international court or tribunal with authority to make decisions binding on the parties in relation to the dispute. Countermeasures are a form of self-help, which responds to the position of the injured State in an international system in which the impartial settlement of disputes through due process of law is not yet guaranteed. Where a third party procedure exists and has been invoked by either party to the dispute, the requirements of that procedure, e.g. as to interim measures of protection, should substitute as far as possible for countermeasures. On the other hand, even where an international court or tribunal has jurisdiction over a dispute and authority to indicate interim measures of protection, it may be that the responsible State is not cooperating in that process. In such cases the remedy of countermeasures necessarily revives.

(3) The system of article 52 builds upon the observations of the Tribunal in the *Air Services* arbitration.⁸³⁰ The first requirement, set out in subparagraph (1) (a), is that the injured State must call on the responsible State to fulfil its obligations of cessation and reparation before any resort to countermeasures. This requirement (sometimes referred to as “*sommaton*”) was stressed both by the Tribunal in the *Air Services* arbitration⁸³¹ and by the International Court in the *Gabčíkovo-Nagymaros Project* case.⁸³² It also appears to reflect a general practice.⁸³³

(4) The principle underlying the notification requirement is that, considering the exceptional nature and potentially serious consequences of countermeasures, they should not be taken before the other State is given notice of a claim and some opportunity to present a response. In practice, however, there are usually quite extensive and detailed negotiations over a dispute before the

⁸²⁹ See above, introduction to this chapter, para. (7).

⁸³⁰ *Air Services Agreement of 27 March 1946 (United States v. France)*, UNRIAA., vol. XVIII, p. 417 (1978), at pp. 445-446, paras. 91, 94-96.

⁸³¹ *Ibid.*, at p. 444, paras. 85-7.

⁸³² *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, p. 7, at p. 56, para. 84.

⁸³³ A. Gianelli, *Adempimenti preventivi all'adozione di contromisure internazionali* (Giuffrè, Milan, 2000).

point is reached where some countermeasures are contemplated. In such cases the injured State will already have notified the responsible State of its claim in accordance with article 43, and it will not have to do it again in order to comply with subparagraph 1 (a).

(5) Subparagraph 1 (b) requires that the injured State which decides to take countermeasures should notify the responsible State of that decision to take countermeasures and offer to negotiate with that State. Countermeasures can have serious consequences for the target State, which should have the opportunity to reconsider its position faced with the proposed countermeasures. The temporal relationship between the operation of subparagraphs 1 (a) and 1 (b) is not strict. Notifications could be made close to each other or even at the same time.

(6) Under paragraph 2, however, the injured State may take “such urgent countermeasures as are necessary to preserve its rights” even before any notification of the intention to do so. Under modern conditions of communications, a State which is responsible for an internationally wrongful act and which refuses to cease that act or provide any redress therefor may also seek to immunize itself from countermeasures, for example by withdrawing assets from banks in the injured State. Such steps can be taken within a very short time, so that the notification required by subparagraph (1) (b) might frustrate its own purpose. Hence paragraph 2 allows for urgent countermeasures which are necessary to preserve the rights of the injured State: this phrase includes both its rights in the subject-matter of the dispute and its right to take countermeasures. Temporary stay orders, the temporary freezing of assets and similar measures could fall within paragraph 2, depending on the circumstances.

(7) Paragraph 3 deals with the case in which the wrongful act has ceased and the dispute is submitted to a court or tribunal which has the authority to decide it with binding effect for the parties. In such a case, and for so long as the dispute settlement procedure is being implemented in good faith, unilateral action by way of countermeasures is not justified. Once the conditions in paragraph 3 are met the injured State may not take countermeasures; if already taken, they must be suspended “without undue delay”. The phrase “without undue delay” allows a limited tolerance for the arrangements required to suspend the measures in question.

(8) A dispute is not “pending before a court or tribunal” for the purposes of subparagraph 3 (b) unless the court or tribunal exists and is in a position to deal with the case. For these purposes a dispute is not pending before an ad hoc tribunal established pursuant to a treaty until the tribunal is actually constituted, a process which will take some time even if both

parties are cooperating in the appointment of the members of the tribunal.⁸³⁴ Paragraph 3 is based on the assumption that the court or tribunal to which it refers has jurisdiction over the dispute and also the power to order provisional measures. Such power is a normal feature of the rules of international courts and tribunals.⁸³⁵ The rationale behind paragraph 3 is that once the parties submit their dispute to such a court or tribunal for resolution, the injured State may request it to order provisional measures to protect its rights. Such a request, provided the court or tribunal is available to hear it, will perform a function essentially equivalent to that of countermeasures. Provided the order is complied with it will make countermeasures unnecessary pending the decision of the tribunal. The reference to a “court or tribunal” is intended to refer to any third party dispute settlement procedure, whatever its designation. It does not, however, refer to political organs such as the Security Council. Nor does it refer to a tribunal with jurisdiction between a private party and the responsible State, even if the dispute between them has given rise to the controversy between the injured State and the responsible State. In such cases, however, the fact that the underlying dispute has been submitted to arbitration will be relevant for the purposes of articles 49 and 51, and only in exceptional cases will countermeasures be justified.⁸³⁶

⁸³⁴ Hence art. 290 (5) of the United Nations Convention on the Law of the Sea (Montego Bay, United Nations, *Treaty Series*, vol. 1833, p. 396) provides for the International Tribunal on the Law of the Sea to deal with provisional measures requests “[p]ending the constitution of an arbitral tribunal to which the dispute is being submitted”.

⁸³⁵ The binding effect of provisional measures orders under Part XI of the 1982 Convention is assured by art. 290 (6). For the binding effect of provisional measures orders under art. 41 of the Statute of the International Court of Justice see the decision in *LaGrand (Germany v. United States of America)*, *Merits*, judgment of 27 June 2001, paras. 99-104.

⁸³⁶ Under the Washington Convention of 1965, the State of nationality may not bring an international claim of behalf of a claimant individual or company “in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such a dispute”: Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, United Nations, *Treaty Series*, vol. 575, p. 159., art. 27 (1); C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) pp. 397-414. This excludes all forms of invocation of responsibility by the State of nationality, including the taking of countermeasures. See commentary to article 42, para. (2).

(9) Paragraph 4 of article 52 provides a further condition for the suspension of countermeasures under paragraph 3. It comprehends various possibilities, ranging from an initial refusal to cooperate in the procedure, for example by non-appearance, through non-compliance with a provisional measures order, whether or not it is formally binding, through to refusal to accept the final decision of the court or tribunal. This paragraph also applies to situations where a State party fails to cooperate in the establishment of the relevant tribunal or fails to appear before the tribunal once it is established. Under the circumstances of paragraph 4, the limitations to the taking of countermeasures under paragraph 3 do not apply.

Article 53

Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

Commentary

- (1) Article 53 deals with the situation where the responsible State has complied with its obligations of cessation and reparation under Part Two in response to countermeasures taken by the injured State. Once the responsible State has complied with its obligations under Part Two, no ground is left for maintaining countermeasures, and they must be terminated forthwith.
- (2) The notion that countermeasures must be terminated as soon as the conditions which justified them have ceased is implicit in the other articles in this chapter. In view of its importance, however, article 53 makes this clear. It underlines the specific character of countermeasures under article 49.

Article 54

Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Commentary

(1) Chapter II deals with the right of an injured State to take countermeasures against a responsible State in order to induce that State to comply with its obligations of cessation and reparation. However, “injured” States, as defined in article 42 are not the only States entitled to invoke the responsibility of a State for an internationally wrongful act under chapter I of this Part. Article 48 allows such invocation by any State, in the case of the breach of an obligation to the international community as a whole, or by any member of a group of States, in the case of other obligations established for the protection of the collective interest of the group. By virtue of article 48 (2), such States may also demand cessation and performance in the interests of the beneficiaries of the obligation breached. Thus with respect to the obligations referred to in article 48, such States are recognized as having a legal interest in compliance. The question is to what extent these States may legitimately assert a right to react against unremedied breaches.⁸³⁷

(2) It is vital for this purpose to distinguish between individual measures, whether taken by one State or by a group of States each acting in its individual capacity and through its own organs on the one hand, and institutional reactions in the framework of international organisations on the other. The latter situation, for example where it occurs under the authority of Chapter VII of the United Nations Charter, is not covered by the Articles.⁸³⁸ More generally the Articles do not cover the case where action is taken by an international organization, even though the member States may direct or control its conduct.⁸³⁹

⁸³⁷ See e.g., M. Akehurst, “Reprisals by Third States”, *B.Y.I.L.*, vol. 44 (1970), p. 1; J.I. Charney, “Third State Remedies in International Law”, *Michigan Journal of International Law*, vol. 10 (1988), p. 57; D.N. Hutchinson, “Solidarity and Breaches of Multilateral Treaties”, *B.Y.I.L.*, vol. 59 (1988), p. 151; L.-A. Sicilianos, *Les réactions décentralisées à l’illicite* (Paris, LDGJ, 1990), pp. 110-175; B. Simma, “From Bilateralism to Community Interest in International Law”, *Recueil des cours*, vol. 250 (1994-VI), p. 217; J.A. Frowein, “Reactions by Not Directly Affected States to Breaches of Public International Law”, *Recueil des cours*, vol. 248 (1994-IV), p. 345.

⁸³⁸ See article 59 and commentary.

⁸³⁹ See article 57 and commentary.

(3) Practice on this subject is limited and rather embryonic. In a number of instances, States have reacted against what were alleged to be breaches of the obligations referred to in article 48 without claiming to be individually injured. Reactions have taken such forms as economic sanctions or other measures (e.g. breaking off air links or other contacts). Examples include the following:

- *USA - Uganda (1978)*. In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda.⁸⁴⁰ The legislation recited that “[t]he Government of Uganda... has committed genocide against Ugandans” and that the “United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide”.⁸⁴¹
- *Certain western countries - Poland and Soviet Union (1981)*. On 13 December 1981, the Polish government imposed martial law and subsequently suppressed demonstrations and interned many dissidents.⁸⁴² The United States and other western countries took action against both Poland and the Soviet Union. The measures included the suspension, with immediate effect, of treaties providing for landing rights of Aeroflot in the United States and LOT in the United States, Great Britain, France, the Netherlands, Switzerland and Austria.⁸⁴³ The suspension procedures provided for in the respective treaties were disregarded.⁸⁴⁴
- *Collective measures against Argentina (1982)*. In April 1982, when Argentina took control over part of the Falkland Islands (Malvinas), the Security Council called for an immediate withdrawal.⁸⁴⁵ Following a request by the United Kingdom,

⁸⁴⁰ Uganda Embargo Act, 22 USC s. 2151 (1978).

⁸⁴¹ *Ibid.*, sections. 5c, 5d.

⁸⁴² *R.G.D.I.P.*, vol. 86 (1982), pp. 603-604.

⁸⁴³ *Ibid.*, p. 607.

⁸⁴⁴ See e.g. art. XV of the US-Polish agreement of 1972, 23 U.S.T. 4269; art. XVII of the US-Soviet agreement of 1967, *I.L.M.*, vol. 6, (1967), p. 82; *I.L.M.*, vol. 7 (1968), p. 571.

⁸⁴⁵ S.C. Res. 502 (1982), 3 April 1982.

E.C. members, Australia, New Zealand and Canada adopted trade sanctions. These included a temporary prohibition on all imports of Argentine products, which ran contrary to article XI:1 and possibly article III of the GATT. It was disputed whether the measures could be justified under the national security exception provided for in article XXI (b) (iii) of the GATT.⁸⁴⁶ The embargo adopted by the European countries also constituted a suspension of Argentina's rights under two sectoral agreements on trade in textiles and trade in mutton and lamb,⁸⁴⁷ for which security exceptions of GATT did not apply.

- *USA - South Africa (1986)*. When in 1985, the South African government declared a state of emergency in large parts of the country, the UN Security Council recommended the adoption of sectoral economic boycotts and the freezing of cultural and sports relations.⁸⁴⁸ Subsequently, some countries introduced measures which went beyond those recommended by the Security Council. The United States Congress adopted the Comprehensive Anti-Apartheid Act which suspended landing rights of South African Airlines on US territory.⁸⁴⁹ This immediate suspension was contrary to the terms of the 1947 US-South African Aviation Agreement⁸⁵⁰ and was justified as a measure which should encourage the South African government "to adopt measures leading towards the establishment of a non-racial democracy".⁸⁵¹

⁸⁴⁶ Western States' reliance on this provision was disputed by other GATT members, cf. Communiqué of western countries, GATT doc. L. 5319/Rev.1 and the statements by Spain and Brasil, GATT doc. C/M/157, pp. 5-6. For an analysis see H. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (Berlin, Springer, 1996), pp. 328-34.

⁸⁴⁷ The treaties are reproduced in *O.J.E.C.* 1979 L 298, p. 2; *O.J.E.C.*, 1980 L 275, p. 14.

⁸⁴⁸ S.C. Res. 569 (1985), 26 July 1985. For further references see L-A. Sicilianos, *Les réactions décentralisées à l'illicite* (Paris, L.D.G.J., 1990), p. 165.

⁸⁴⁹ For the text of this provision see *I.L.M.*, vol. 26 (1987), p. 79, (s. 306).

⁸⁵⁰ United Nations, *Treaty Series*, vol. 66, p. 233, art. VI.

⁸⁵¹ For the implementation order, see *I.L.M.*, vol. 26 (1987), p. 105.

- *Collective measures against Iraq (1990)*. On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The United Nations Security Council immediately condemned the invasion. E.C. member States and the United States adopted trade embargos and decided to freeze Iraqi assets.⁸⁵² This action was taken in direct response to the Iraqi invasion with the consent of the Government of Kuwait.
- *Collective measures against Yugoslavia (1998)*. In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban.⁸⁵³ For a number of countries, such as Germany, France and the United Kingdom, the latter measure implied the non-performance of bilateral aviation agreements.⁸⁵⁴ Because of doubts about the legitimacy of the action, the British government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect. Justifying the measure, it stated that “President Milosevic’s ... worsening record on human rights, means that, on moral and political grounds, he has forfeited the right of his Government to insist on the 12 months notice which would normally apply.”⁸⁵⁵ The Federal Republic of Yugoslavia protested these measures as “unlawful, unilateral and an example of the policy of discrimination”.⁸⁵⁶

⁸⁵² See e.g. President Bush’s Executive Orders of 2 August 1990, reproduced in *A.J.I.L.*, vol. 84 (1990), p. 903.

⁸⁵³ Common positions of 7 May and 29 June 1998, *O.J.E.C.* 1998, L 143 (p. 1) and L 190 (p. 3); implemented through EC Regulations 1295/98 (L 178, p. 33) & 1901/98 (L 248, p. 1).

⁸⁵⁴ See e.g. *U.K.T.S.* 1960, No. 10; *R.T.A.F.* 1967, No. 69.

⁸⁵⁵ See *B.Y.I.L.*, vol. 69 (1998), pp. 580-1; *B.Y.I.L.*, vol. 70 (1999), pp. 555-6.

⁸⁵⁶ Statement of the Government of the Federal Republic of Yugoslavia on the Suspension of Flights of Yugoslav Airlines, 10 October 1999: S/1999/216.

(4) In some other cases, certain States similarly suspended treaty rights in order to exercise pressure on States violating collective obligations. However, they did not rely on a right to take countermeasures but asserted a right to suspend the treaty because of a fundamental change of circumstances. Two examples may be given:

- *Netherlands - Surinam (1982)*. In 1980, a military government seized power in Surinam. In response to a crackdown by the new government on opposition movements in December 1982, the Dutch government suspended a bilateral treaty on development assistance under which Surinam was entitled to financial subsidies.⁸⁵⁷ While the treaty itself did not contain any suspension or termination clauses, the Dutch government stated that the human rights violations in Surinam constituted a fundamental change of circumstances which gave rise to a right of suspension.⁸⁵⁸
- *E.C. Member States - Yugoslavia (1991)*. In the autumn of 1991, in response to resumption of fighting within Yugoslavia, EC members suspended and later denounced the 1983 Co-operation Agreement with Yugoslavia.⁸⁵⁹ This led to a general repeal of trade preferences on imports and thus went beyond the weapons embargo ordered by the Security Council in Resolution 713 of 25 September 1991. The reaction was incompatible with the terms of the Co-operation Agreement, which did not provide for the immediate suspension but only for denunciation upon six months' notice. Justifying the suspension, EC member States explicitly mentioned the threat to peace and security in the region. But as in the case of Surinam, they relied on fundamental change of circumstances, rather than asserting a right to take countermeasures.⁸⁶⁰

⁸⁵⁷ *Tractatenblad* 1975, No. 140. See H.-H. Lindemann, "Die Auswirkungen der Menschenrechtsverletzungen auf die Vertragsbeziehungen zwischen den Niederlanden und Surinam", *Z.a.ö.R.V.*, vol. 44 (1984), p. 64 at pp. 68-69.

⁸⁵⁸ P. Siekmann, "Netherlands State Practice for the Parliamentary Year 1982-1983", *Netherlands Yearbook of International Law*, vol. 15 (1984), p. 321.

⁸⁵⁹ *O.J.E.C.* 1983 L 41, p. 1. See *O.J.E.C.* 1991 L 315, p. 1, for the suspension, and L 325, p. 23, for the denunciation.

⁸⁶⁰ See also the decision of the European Court of Justice: Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, [1998] E.C.R. I-3655, at pp. 3706-3708, paras. 53-59.

(5) In some cases, there has been an apparent willingness on the part of some States to respond to violations of obligations involving some general interest, where those States could not be considered “injured States” in the sense of article 42. It should be noted that in those cases where there was, identifiably, a State primarily injured by the breach in question, other States have acted at the request and on behalf of that State.⁸⁶¹

(6) As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently it is not appropriate to include in the present Articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law.

(7) Article 54 accordingly provides that the chapter on countermeasures does not prejudice the right of any State, entitled under article 48 (1) to invoke the responsibility of another State, to take lawful measures against the responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached. The Article speaks of “lawful measures” rather than “countermeasures” so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole.

PART FOUR

GENERAL PROVISIONS

This Part contains a number of general provisions applicable to the Articles as a whole, specifying either their scope or certain matters not dealt with. First, article 55 makes it clear by reference to the *lex specialis* principle that the Articles have a residual character. Where some

⁸⁶¹ Cf. *Military and Paramilitary Activities* where the International Court noted that action by way of collective self-defence could not be taken by a third State except at the request of the State subjected to the armed attack: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, *I.C.J. Reports 1986*, p. 14, at p. 105, para. 199.

matter otherwise dealt with in the Articles is governed by a special rule of international law, the latter will prevail to the extent of any inconsistency. Correlatively, article 56 makes it clear that the Articles are not exhaustive, and that they do not affect other applicable rules of international law on matters not dealt with. There follow three saving clauses. Article 57 excludes from the scope of the Articles questions concerning the responsibility of international organizations and of States for the acts of international organizations. The Articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State, and this is made clear by article 58. Finally, article 59 reserves the effects of the United Nations Charter itself.

Article 55

Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Commentary

- (1) When defining the primary obligations that apply between them, States often make special provision for the legal consequences of breaches of those obligations, and even for determining whether there has been such a breach. The question then is whether those provisions are exclusive, i.e. whether the consequences which would otherwise apply under general international law, or the rules that might otherwise have applied for determining a breach, are thereby excluded. A treaty may expressly provide for its relationship with other rules. Often, however, it will not do so and the question will then arise whether the specific provision is to coexist with or exclude the general rule that would otherwise apply.
- (2) Article 55 provides that the Articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law. It reflects the maxim *lex specialis derogat legi generali*. Although it may provide an important indication, this is only one of a number of possible approaches towards determining which of several rules potentially applicable is to prevail or whether the rules simply coexist. Another gives priority, as between the parties, to the

rule which is later in time.⁸⁶² In certain cases the consequences that follow from a breach of some overriding rule may themselves have a peremptory character. For example States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law. Thus the assumption of article 55 is that the special rules in question have at least the same legal rank as those expressed in the Articles. On that basis, article 55 makes it clear that the present articles operate in a residual way.

(3) It will depend on the special rule to establish the extent to which the more general rules on State responsibility set out in the present articles are displaced by that rule. In some cases it will be clear from the language of a treaty or other text that only the consequences specified are to flow. Where that is so, the consequence will be “determined” by the special rule and the principle embodied in article 56 will apply. In other cases, one aspect of the general law may be modified, leaving other aspects still applicable. An example of the former is the World Trade Organization Dispute Settlement Understanding as it relates to certain remedies.⁸⁶³ An example of the latter is article 41 of the European Convention on Human Rights.⁸⁶⁴ Both concern matters dealt with in Part Two of the Articles. The same considerations apply to Part One. Thus a particular treaty might impose obligations on a State but define the “State” for that purpose in a

⁸⁶² See Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 30 (3).

⁸⁶³ Agreement establishing the World Trade Organization, Marrakesh, United Nations, *Treaty Series*, vol. 1867, p. 3, Annex 2, Understanding on Rules and Procedures governing the Settlement of Disputes, esp. art. 3 (7), which provides for compensation “only if the immediate withdrawal of the measure is impractical and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement”. For WTO purposes, “compensation” refers to the future conduct, not past conduct and involves a form of countermeasure. See art. 22. On the distinction between cessation and reparation for WTO purposes see e.g. *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, Panel Report, 21 January 2000, WT/DS126/RW, para. 6.49.

⁸⁶⁴ See commentary to article 32, paragraph (2).

way which produces different consequences than would otherwise flow from the rules of attribution in chapter II.⁸⁶⁵ Or a treaty might exclude a State from relying on *force majeure* or necessity.

(4) For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus the question is essentially one of interpretation. For example in the *Neumeister* case, the European Court of Human Rights held that the specific obligation in article 5 (5) of the European Convention for compensation for unlawful arrest or detention did not prevail over the more general provision for compensation in article 50. In the Court's view, to have applied the *lex specialis* principle to article 5 (5) would have led to "consequences incompatible with the aim and object of the treaty".⁸⁶⁶ It was sufficient, in applying article 50, to take account of the specific provision.⁸⁶⁷

(5) Article 55 is designed to cover both "strong" forms of *lex specialis*, including what are often referred to as self-contained regimes, as well as "weaker" forms such as specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution. The Permanent Court of International Justice referred to the notion of a self-contained regime in

⁸⁶⁵ Thus article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, *Treaty Series*, vol. 1465, p. 112, only applies to torture committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". This is probably narrower than the bases for attribution of conduct to the State in Part One, chapter II. Cf. "federal" clauses, allowing certain component units of the State to be excluded from the scope of a treaty or limiting obligations of the federal State with respect to such units, e.g. UNESCO Convention for the Protection of the World Cultural and Natural Heritage, United Nations, *Treaty Series*, vol. 1037, p. 151, art. 34.

⁸⁶⁶ *E.C.H.R., Series A, No. 17* (1974), p. 13, para. 29; see also *ibid.*, pp. 12-14, paras. 28-31.

⁸⁶⁷ See also *Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A, No. 2*, at pp. 29-33; *Colleanu v. German State*, (1929), *Recueil des tribunaux arbitraux mixtes*, vol. IX, p. 216; WTO, *Turkey - Restrictions on Imports of Textile and Clothing Products*, Panel Report, 31 May 1999, WT/DS34/R, paras. 9.87-9.95; *Beagle Channel Arbitration (Argentina v. Chile)*, *UNRIIAA*, vol. XXI, p. 53 (1977), at p. 100, para. 39. See further C.W. Jenks, "The Conflict of Law-Making Treaties", *B.Y.I.L.*, vol. 30 (1953), p. 401; M. McDougal, H. Lasswell & J. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (New Haven, New Haven Press, 1994), pp. 200-206; P. Reuter, *Introduction au Droit des Traités* (3rd edn.) (Paris, Presses Universitaires de France, 1995), para. 201.

The S.S. Wimbledon with respect to the transit provisions concerning the Kiel Canal in the Treaty of Versailles,⁸⁶⁸ as did the International Court of Justice in the *Diplomatic and Consular Staff* case with respect to remedies for abuse of diplomatic and consular privileges.⁸⁶⁹

(6) The principle stated in article 55 applies to the Articles as a whole. This point is made clear by the use of language (“the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State”) which reflects the content of each of Parts One, Two and Three.

Article 56

Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Commentary

(1) The present Articles set out by way of codification and progressive development the general secondary rules of State responsibility. In that context, article 56 has two functions. First, it preserves the application of the rules of customary international law concerning State responsibility on matters not covered by the Articles. Secondly, it preserves other rules concerning the effects of a breach of an international obligation which do not involve issues of State responsibility but stem from the law of treaties or other areas of international law. It complements the *lex specialis* principle stated in article 55. Like article 55, it is not limited to the legal consequences of wrongful acts but applies to the whole regime of State responsibility set out in the Articles.

(2) As to the first of these functions, the Articles do not purport to state all the consequences of an internationally wrongful act even under existing international law and there is no intention of precluding the further development of the law on State responsibility. For example the principle of law expressed in the maxim *ex injuria jus non oritur* may generate new legal

⁸⁶⁸ 1923, *P.C.I.J., Series A, No. 1*, at pp. 23-24.

⁸⁶⁹ *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at p. 40, para. 86. See commentary to article 50, para. (15), and see also B. Simma, “Self-Contained Regimes”, *Netherlands Yearbook of International Law*, vol. 16 (1985), p. 111.

consequences in the field of responsibility.⁸⁷⁰ In this respect article 56 mirrors the preambular paragraph of the Vienna Convention on the Law of Treaties which affirms that “the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention”. However matters of State responsibility are not only regulated by customary international law but also by some treaties; hence article 56 refers to the “applicable rules of international law”.

(3) A second function served by article 56 is to make it clear that present Articles are not concerned with any legal effects of a breach of an international obligation which do not flow from the rules of State responsibility, but stem from the law of treaties or other areas of law. Examples include the invalidity of a treaty procured by an unlawful use of force,⁸⁷¹ the exclusion of reliance on a fundamental change of circumstances where the change in question results from a breach of an international obligation of the invoking State to any other State party,⁸⁷² or the termination of the international obligation violated in the case of a material breach of a bilateral treaty.⁸⁷³

Article 57

Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

⁸⁷⁰ Another possible example, related to the determination whether there has been a breach of an international obligation, is the so-called principle of “approximate application”, formulated by Sir Hersch Lauterpacht in *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, *I.C.J. Reports 1956*, p. 23, at p. 46. In the *Gabčíkovo-Nagymaros Project* case, the International Court said that “even if such a principle existed, it could by definition only be employed within the limits of the treaty in question”: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports 1997*, p. 7, at p. 53, para. 76. See further S. Rosenne, *Breach of Treaty* (Grotius, Cambridge, 1985) pp. 96-101.

⁸⁷¹ Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 52.

⁸⁷² *Ibid.*, art. 62 (2) (b).

⁸⁷³ *Ibid.*, art. 60 (1).

Commentary

- (1) Article 57 is a saving clause which reserves two related issues from the scope of the Articles. These concern, first, any question involving the responsibility of international organizations, and second, any question concerning the responsibility of any State for the conduct of an international organization.
- (2) In accordance with the articles prepared by the Commission on other topics, the expression “international organization” means an “intergovernmental organization”.⁸⁷⁴ Such an organization possesses separate legal personality under international law,⁸⁷⁵ and is responsible for its own acts, i.e., for acts which are carried out by the organization through its own organs or officials.⁸⁷⁶ By contrast, where a number of States act together through their own organs as distinct from those of an international organization, the conduct in question is that of the States concerned, in accordance with the principles set out in chapter II of Part One. In such cases, as article 47 confirms, each State remains responsible for its own conduct.
- (3) Just as a State may second officials to another State, putting them at its disposal so that they act for the purposes of and under the control of the latter, so the same could occur as between an international organization and a State. The former situation is covered by article 6. As to the latter situation, if a State seconds officials to an international organization so that they act as organs or officials of the organization, their conduct will be attributable to the organization, not the sending State, and will fall outside the scope of the Articles. As to the

⁸⁷⁴ See Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, art. 2 (1) (i).

⁸⁷⁵ A firm foundation for the international personality of the United Nations is laid in the International Court’s advisory opinion in *Reparation for Injuries Suffered in the Service of the United Nations*, *I.C.J. Reports 1949*, p. 174, at p. 179.

⁸⁷⁶ As the International Court has observed, “the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts”. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, *I.C.J. Reports 1999*, p. 62, at pp. 88-89, para. 66.

converse situation, in practice there do not seem to be convincing examples of organs of international organizations which have been “placed at the disposal of” a State in the sense of article 6,⁸⁷⁷ and there is no need to provide expressly for the possibility.

(4) Article 57 also excludes from the scope of the Articles issues of the responsibility of a State for the acts of an international organization, i.e., those cases where the international organization is the actor and the State is said to be responsible by virtue of its involvement in the conduct of the organization or by virtue of its membership of the organization. Formally such issues could fall within the scope of the present Articles since they concern questions of State responsibility akin to those dealt with in chapter IV of Part One. But they raise controversial substantive questions as to the functioning of international organizations and the relations between their members, questions which are better dealt with in the context of the law of international organizations.⁸⁷⁸

⁸⁷⁷ Cf. *Yearbook ... 1974*, vol. II, pp. 286-290. The High Commissioner for the Free City of Danzig was appointed by the League of Nations Council and was responsible to it; see *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, 1932*, P.C.I.J., Series A/B, No. 44, p. 4. Although the High Commission exercised powers in relation to Danzig, it is doubtful that he was placed at the disposal of Danzig within the meaning of article 6. The position of the High Representative, appointed pursuant to Annex 10 of the General Framework Agreement for Peace in Bosnia-Herzegovina of 14 December 1995, is also unclear. The Constitutional Court of Bosnia-Herzegovina has held that the High Representative has a dual role, both as an international agent and as a official in certain circumstances acting in and for Bosnia-Herzegovina; in the latter respect, the High Representative's acts are subject to constitutional control. See *Case U 9/100 Regarding the Law on the State Border Service*, judgment of 3 November 2000.

⁸⁷⁸ This area of international law has acquired significance following controversies, *inter alia*, over the International Tin Council: *J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry* [1990] 2 A.C. 418 (England, House of Lords); *Case 241/87 Maclaine Watson & Co Ltd. v. Council and Commission of the European Communities* [1990] E.C.R. I-1797 (E.C.J.) and the Arab Organization for Industrialization (*Westland Helicopters Ltd. v. Arab Organization for Industrialization*, (1985), I.L.R., vol. 80, p. 595 (I.C.C. Award); *Arab Organization for Industrialization v. Westland Helicopters Ltd.*, (1987) I.L.R., vol. 80, p. 622 (Switzerland, Federal Supreme Court); *Westland Helicopters Ltd. v. Arab Organization for Industrialization*, (1994) I.L.R. vol. 108, p. 564 (England, High Court). See also *Waite and Kennedy v. Germany*, E.C.H.R. Reports 1999-I, p. 393.

(5) On the other hand article 57 does not exclude from the scope of the Articles any question of the responsibility of a State for its own conduct, i.e., for conduct attributable to it under chapter II of Part One, not being conduct performed by an organ of an international organization. In this respect the scope of article 57 is narrow. It covers only what is sometimes referred to as the derivative or secondary liability of member States for the acts or debts of an international organization.⁸⁷⁹

Article 58

Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Commentary

(1) Article 58 makes clear that the Articles as a whole do not address any question of the individual responsibility under international law of any person acting on behalf of a State. It clarifies a matter which could be inferred in any case from the fact that the Articles only address issues relating to the responsibility of States.

(2) The principle that individuals, including State officials, may be responsible under international law was established in the aftermath of World War II. It was included in the London Charter of 1945 which established the Nürnberg Tribunal⁸⁸⁰ and was subsequently endorsed by the General Assembly.⁸⁸¹ It underpins more recent developments in the field of international criminal law, including the two ad hoc tribunals and the Rome Statute of the

⁸⁷⁹ See the work of the Institut de Droit International under Prof. R. Higgins *Annuaire de l'Institut de Droit International*, vol. 66-I (1995), p. 251; vol. 66-II (1996), p. 444; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruylant Editions de l'Université de Bruxelles, Brussels, 1998). See also WTO, *Turkey - Restrictions on Imports of Textile and Clothing Products*, Panel Report, 31 May 1999, WT/DS34/R, paras. 9.33-9.44.

⁸⁸⁰ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, London, United Nations, *Treaty Series*, vol. 82, p. 279.

⁸⁸¹ G.A. Res. 95 (I), 11 December 1946. See also the International Law Commission's Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook...* 1950, vol. II, p. 374.

International Criminal Court.⁸⁸² So far this principle has operated in the field of criminal responsibility, but it is not excluded that developments may occur in the field of individual civil responsibility.⁸⁸³ As a saving clause article 58 is not intended to exclude that possibility; hence the use of the general term “individual responsibility”.

(3) Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility.⁸⁸⁴ The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.⁸⁸⁵ Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them. The former principle is reflected, for example, in article 25 (4) of the Rome Statute, which provides that “[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.” The latter is reflected, for example, in the well-established principle that official position does not excuse a person from individual criminal responsibility under international law.⁸⁸⁶

⁸⁸² See commentary to Part Two, chapter III, para. (6).

⁸⁸³ See e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, *Treaty Series*, vol. 1465 p. 112, art. 14, dealing with compensation for victims of torture.

⁸⁸⁴ See e.g., *Streletz, Kessler & Krenz v. Germany*, (Applications Nos. 34044/96, 35532/97 and 44801/98), European Court of Human Rights, judgement of 22 March 2001, at para. 104; (“If the GDR still existed, it would be responsible from the viewpoint of international law for the acts concerned. It remains to be established that alongside that State responsibility the applicants individually bore criminal responsibility at the material time”).

⁸⁸⁵ Prosecution and punishment of responsible State officials may be relevant to reparation, especially satisfaction: see commentary to article 36, para. (5).

⁸⁸⁶ See e.g., the International Law Commission’s Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle III (*Yearbook...* 1950, vol. II, p. 374, at p. 375); Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, art. 27.

(4) Article 58 reflects this situation, making it clear that the Articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term “individual responsibility” has acquired an accepted meaning in light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.

Article 59

Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

Commentary

(1) In accordance with article 103 of the Charter, “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” The focus of article 103 is on treaty obligations inconsistent with obligations arising under the Charter. But such conflicts can have an incidence on issues dealt with in the Articles, as for example in the *Lockerbie* cases.⁸⁸⁷ More generally, the competent organs of the United Nations have often recommended or required that compensation be paid following conduct by a State characterized as a breach of its international obligations, and article 103 may have a role to play in such cases.

(2) Article 59 accordingly provides that the Articles cannot affect and are without prejudice to the Charter of the United Nations. The Articles are in all respects to be interpreted in conformity with the Charter of the United Nations.

⁸⁸⁷ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, I.C.J. Reports 1992, p. 3; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, I.C.J. Reports 1992, p. 114.

Changes to legislation: Data Protection Act 1998, SCHEDULE 1 is up to date with all changes known to be in force on or before 16 October 2017. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

SCHEDULES

SCHEDULE 1

Section 4(1) and (2).

THE DATA PROTECTION PRINCIPLES

Annotations:

Modifications etc. (not altering text)

- C1** Sch. 1 applied (N.I.) (30.3.2016) by [The Court Files Privileged Access Rules \(Northern Ireland\) 2016 \(S.R. 2016/123\), rules 1, 7\(2\)](#)
- C2** Sch. 1 applied (N.I.) (30.3.2016) by [The Court Files Privileged Access Rules \(Northern Ireland\) 2016 \(S.R. 2016/123\), rules 1, 5](#)

PART I

THE PRINCIPLES

- 1 Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—
 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
- 2 Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.
- 3 Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.
- 4 Personal data shall be accurate and, where necessary, kept up to date.
- 5 Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.
- 6 Personal data shall be processed in accordance with the rights of data subjects under this Act.
- 7 Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.
- 8 Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

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PART II

INTERPRETATION OF THE PRINCIPLES IN PART I

The first principle

- 1 (1) In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.
- (2) Subject to paragraph 2, for the purposes of the first principle data are to be treated as obtained fairly if they consist of information obtained from a person who—
 - (a) is authorised by or under any enactment to supply it, or
 - (b) is required to supply it by or under any enactment or by any convention or other instrument imposing an international obligation on the United Kingdom.
- 2 (1) Subject to paragraph 3, for the purposes of the first principle personal data are not to be treated as processed fairly unless—
 - (a) in the case of data obtained from the data subject, the data controller ensures so far as practicable that the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3), and
 - (b) in any other case, the data controller ensures so far as practicable that, before the relevant time or as soon as practicable after that time, the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3).
- (2) In sub-paragraph (1)(b) “the relevant time” means—
 - (a) the time when the data controller first processes the data, or
 - (b) in a case where at that time disclosure to a third party within a reasonable period is envisaged—
 - (i) if the data are in fact disclosed to such a person within that period, the time when the data are first disclosed,
 - (ii) if within that period the data controller becomes, or ought to become, aware that the data are unlikely to be disclosed to such a person within that period, the time when the data controller does become, or ought to become, so aware, or
 - (iii) in any other case, the end of that period.
- (3) The information referred to in sub-paragraph (1) is as follows, namely—
 - (a) the identity of the data controller,
 - (b) if he has nominated a representative for the purposes of this Act, the identity of that representative,
 - (c) the purpose or purposes for which the data are intended to be processed, and
 - (d) any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair.
- 3 (1) Paragraph 2(1)(b) does not apply where either of the primary conditions in sub-paragraph (2), together with such further conditions as may be prescribed by the [F1 Secretary of State] by order, are met.

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- (2) The primary conditions referred to in sub-paragraph (1) are—
- (a) that the provision of that information would involve a disproportionate effort, or
 - (b) that the recording of the information to be contained in the data by, or the disclosure of the data by, the data controller is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

Annotations:

Amendments (Textual)

- F1** Words in Sch. 1 Pt. 2 para. 3 substituted (19.8.2003) by [The Secretary of State for Constitutional Affairs Order 2003 \(S.I. 2003/1887\)](#), [art. 9](#), [Sch. 2 para. 9\(1\)\(b\)](#)

Commencement Information

- I1** Sch. 1 Pt. II para. 3 wholly in force at 1.3.2000; Sch. 1 Pt. II para. 3 in force for certain purposes at Royal Assent see s. 75(2)(i); Sch. 1 Pt. II para. 3 in force at 1.3.2000 insofar as not already in force by [S.I. 2000/183](#), [art. 2\(1\)](#)

- 4 (1) Personal data which contain a general identifier falling within a description prescribed by the [^{F2} Secretary of State] by order are not to be treated as processed fairly and lawfully unless they are processed in compliance with any conditions so prescribed in relation to general identifiers of that description.
- (2) In sub-paragraph (1) “a general identifier” means any identifier (such as, for example, a number or code used for identification purposes) which—
- (a) relates to an individual, and
 - (b) forms part of a set of similar identifiers which is of general application.

Annotations:

Amendments (Textual)

- F2** Words in Sch. 1 Pt. 2 para. 4 substituted (19.8.2003) by [The Secretary of State for Constitutional Affairs Order 2003 \(S.I. 2003/1887\)](#), [art. 9](#), [Sch. 2 para. 9\(1\)\(b\)](#)

Commencement Information

- I2** Sch. 1 Pt. II para. 4 wholly in force at 1.3.2000; Sch. 1 Pt. II para. 4 in force for certain purposes at Royal Assent see s. 75(2)(i); Sch. 1 Pt. II para. 4 in force at 1.3.2000 insofar as not already in force by [S.I. 2000/183](#), [art. 2\(1\)](#)

The second principle

- 5 The purpose or purposes for which personal data are obtained may in particular be specified—
- (a) in a notice given for the purposes of paragraph 2 by the data controller to the data subject, or
 - (b) in a notification given to the Commissioner under Part III of this Act.
- 6 In determining whether any disclosure of personal data is compatible with the purpose or purposes for which the data were obtained, regard is to be had to the

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purpose or purposes for which the personal data are intended to be processed by any person to whom they are disclosed.

The fourth principle

- 7 The fourth principle is not to be regarded as being contravened by reason of any inaccuracy in personal data which accurately record information obtained by the data controller from the data subject or a third party in a case where—
- (a) having regard to the purpose or purposes for which the data were obtained and further processed, the data controller has taken reasonable steps to ensure the accuracy of the data, and
 - (b) if the data subject has notified the data controller of the data subject's view that the data are inaccurate, the data indicate that fact.

The sixth principle

- 8 A person is to be regarded as contravening the sixth principle if, but only if—
- (a) he contravenes section 7 by failing to supply information in accordance with that section,
 - (b) he contravenes section 10 by failing to comply with a notice given under subsection (1) of that section to the extent that the notice is justified or by failing to give a notice under subsection (3) of that section,
 - (c) he contravenes section 11 by failing to comply with a notice given under subsection (1) of that section, or
 - (d) he contravenes section 12 by failing to comply with a notice given under subsection (1) or (2)(b) of that section or by failing to give a notification under subsection (2)(a) of that section or a notice under subsection (3) of that section.

The seventh principle

- 9 Having regard to the state of technological development and the cost of implementing any measures, the measures must ensure a level of security appropriate to—
- (a) the harm that might result from such unauthorised or unlawful processing or accidental loss, destruction or damage as are mentioned in the seventh principle, and
 - (b) the nature of the data to be protected.
- 10 The data controller must take reasonable steps to ensure the reliability of any employees of his who have access to the personal data.
- 11 Where processing of personal data is carried out by a data processor on behalf of a data controller, the data controller must in order to comply with the seventh principle—
- (a) choose a data processor providing sufficient guarantees in respect of the technical and organisational security measures governing the processing to be carried out, and
 - (b) take reasonable steps to ensure compliance with those measures.
- 12 Where processing of personal data is carried out by a data processor on behalf of a data controller, the data controller is not to be regarded as complying with the seventh principle unless—

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- (a) the processing is carried out under a contract—
 - (i) which is made or evidenced in writing, and
 - (ii) under which the data processor is to act only on instructions from the data controller, and
- (b) the contract requires the data processor to comply with obligations equivalent to those imposed on a data controller by the seventh principle.

The eighth principle

- 13 An adequate level of protection is one which is adequate in all the circumstances of the case, having regard in particular to—
- (a) the nature of the personal data,
 - (b) the country or territory of origin of the information contained in the data,
 - (c) the country or territory of final destination of that information,
 - (d) the purposes for which and period during which the data are intended to be processed,
 - (e) the law in force in the country or territory in question,
 - (f) the international obligations of that country or territory,
 - (g) any relevant codes of conduct or other rules which are enforceable in that country or territory (whether generally or by arrangement in particular cases), and
 - (h) any security measures taken in respect of the data in that country or territory.
- 14 The eighth principle does not apply to a transfer falling within any paragraph of Schedule 4, except in such circumstances and to such extent as the [^{F3} Secretary of State] may by order provide.

Annotations:

Amendments (Textual)

- F3** Words in Sch. 1 Pt. 2 para. 14 substituted (19.8.2003) by [The Secretary of State for Constitutional Affairs Order 2003 \(S.I. 2003/1887\)](#), [art. 9](#), [Sch. 2 para. 9\(1\)\(b\)](#)

Commencement Information

- I3** Sch. 1 Pt. II para. 14 wholly in force at 1.3.2000; Sch. 1 Pt. II para. 14 in force for certain purposes at Royal Assent see s. 75(2)(i); Sch. 1 Pt. II para. 14 in force at 1.3.2000 insofar as not already in force by [S.I. 2000/183](#), [art. 2\(1\)](#)

- 15 (1) Where—
- (a) in any proceedings under this Act any question arises as to whether the requirement of the eighth principle as to an adequate level of protection is met in relation to the transfer of any personal data to a country or territory outside the European Economic Area, and
 - (b) a Community finding has been made in relation to transfers of the kind in question,
- that question is to be determined in accordance with that finding.
- (2) In sub-paragraph (1) “Community finding” means a finding of the European Commission, under the procedure provided for in Article 31(2) of the Data Protection Directive, that a country or territory outside the European Economic Area does, or

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does not, ensure an adequate level of protection within the meaning of Article 25(2) of the Directive.

Changes to legislation:

Data Protection Act 1998, SCHEDULE 1 is up to date with all changes known to be in force on or before 16 October 2017. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.

Changes and effects yet to be applied to :

- Sch. 1 Pt. 2 para. 5(b) and word omitted by [2017 c. 30 s. 111\(5\)](#)

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 20(2)(aa) inserted by [2009 c. 25 Sch. 20 para. 4\(c\)](#)
- s. 31(4)(a)(va) inserted by [2016 c. 21 \(N.I.\) Sch. 3 para. 13](#)
- s. 55(2)(ca) inserted by [2008 c. 4 s. 78](#)



EU Directive 95/46/EC - The Data Protection Directive

CHAPTER II - GENERAL RULES ON THE LAWFULNESS OF THE PROCESSING OF PERSONAL DATA

Article 5

Member States shall, within the limits of the provisions of this Chapter, determine more precisely the conditions under which the processing of personal data is lawful.

SECTION I

PRINCIPLES RELATING TO DATA QUALITY

Article 6

1. Member States shall provide that personal data must be:

- (a) processed fairly and lawfully;
- (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;
- (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
- (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;
- (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.

2. It shall be for the controller to ensure that paragraph 1 is complied with.

SECTION II

CRITERIA FOR MAKING DATA PROCESSING LEGITIMATE

Article 7

Member States shall provide that personal data may be processed only if:

- (a) the data subject has unambiguously given his consent, or
- (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract, or
- (c) processing is necessary for compliance with a legal obligation to which the controller is subject, or
- (d) processing is necessary in order to protect the vital interests of the data subject, or
- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed, or
- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection under Article 1(1).

SECTION III

SPECIAL CATEGORIES OF PROCESSING

Article 8

The processing of special categories of data

1. Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.

2. Paragraph 1 shall not apply where:

(a) the data subject has given his explicit consent to the processing of those data, except where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject's giving his consent; or

(b) processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law insofar as it is authorized by national law providing for adequate safeguards; or

(c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his consent; or

(d) processing is carried out in the course of its legitimate activities with appropriate guarantees by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects; or

(e) the processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims.

3. Paragraph 1 shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject under national law or rules established by national competent bodies to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy.

4. Subject to the provision of suitable safeguards, Member States may, for reasons of substantial public interest, lay down exemptions in addition to those laid down in paragraph 2 either by national law or by decision of the supervisory authority.

5. Processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law, subject to derogations which may be granted by the Member State under national provisions providing suitable specific safeguards. However, a complete register of criminal convictions may be kept only under the control of official authority.

Member States may provide that data relating to administrative sanctions or judgments in civil cases shall also be processed under the control of official authority.

6. Derogations from paragraph 1 provided for in paragraphs 4 and 5 shall be notified to the Commission.

7. Member States shall determine the conditions under which a national identification number or any other identifier of general application may be processed.

Article 9

Processing of personal data and freedom of expression

Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.

SECTION IV

INFORMATION TO BE GIVEN TO THE DATA SUBJECT

Article 10

Information in cases of collection of data from the data subject

Member States shall provide that the controller or his representative must provide a data subject from whom data relating to himself are collected with at least the following information, except where he already has it:

(a) the identity of the controller and of his representative, if any,

(b) the purposes of the processing for which the data are intended,

(c) any further information such as

- the recipients or categories of recipients of the data;

- whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply;

- the existence of the right of access to and the right to rectify the data concerning him insofar as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.

Article 11

Information where the data have not been obtained from the data subject

1. Where the data have not been obtained from the data subject, Member States shall provide that the controller or his representative must at the time of undertaking the recording of personal data or if a disclosure to a third party is envisaged, no later than the time when the data are first disclosed provide the data subject with at least the following information, except where he already has it:

- (a) the identity of the controller and of his representative, if any,
- (b) the purposes of the processing,
- (c) any further information such as
 - the categories of data concerned
 - the recipients or categories of recipients;
 - the existence of the right of access to and the right to rectify the data concerning him

insofar as such further information is necessary, having regard to the specific circumstances in which the data are processed, to guarantee fair processing in respect of the data subject.

2. Paragraph 1 shall not apply where, in particular for processing for statistical purposes or for the purposes of historical or scientific research, the provision of such information proves impossible or would involve a disproportionate effort or if recording or disclosure is expressly laid down by law. In these cases Member States shall provide appropriate safeguards.

SECTION V

THE DATA SUBJECT'S RIGHT OF ACCESS TO DATA

Article 12

Right of access

Member States shall guarantee every data subject the right to obtain from the controller:

- (a) without constraint at reasonable intervals and without excessive delay or expense:

confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed;

communication to him in an intelligible form of the data undergoing processing and of any available information as to their source;

knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 15(1);

- (b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;

- (c) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort.

SECTION VI

EXEMPTIONS AND RESTRICTIONS

Article 13

Exemptions and restrictions

1. Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6(1), 10, 11(1), 12 and 21 when such a restriction constitutes a necessary measure to safeguard:

- (a) national security;
- (b) defence;
- (c) public security;
- (d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions;
- (e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;
- (f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e);

(g) the protection of the data subject or of the rights and freedoms of others.

2. Subject to adequate legal safeguards, in particular that the data are not used for taking measures or decisions regarding any particular individual, Member States may, where there is clearly no risk of breaching the privacy of the data subject, restrict by a legislative measure the rights provided for in Article 12 when data are processed solely for purposes of scientific research or are kept in personal form for a period which does not exceed the period necessary for the sole purpose of creating statistics.

SECTION VII

THE DATA SUBJECT'S RIGHT TO OBJECT

Article 14

The data subject's right to object

Member States shall grant the data subject the right:

(a) at least in the cases referred to in Article 7(e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data;

(b) to object, on request and free of charge, to the processing of personal data relating to him which the controller anticipates being processed for the purposes of direct marketing, or

to be informed before personal data are disclosed for the first time to third parties or used on their behalf for the purposes of direct marketing, and to be expressly offered the right to object free of charge to such disclosures or uses.

Member States shall take the necessary measures to ensure that data subjects are aware of the existence of the right referred to in the first subparagraph of (b).

Article 15

Automated individual decisions

1. Member States shall grant the right to every person not to be subject to a decision which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc.

2. Subject to the other Articles of this Directive, Member States shall provide that a person may be subjected to a decision of the kind referred to in paragraph 1 if that decision:

(a) is taken in the course of the entering into or performance of a contract, provided the request for the entering into or the performance of the contract, lodged by the data subject, has been satisfied or that there are suitable measures to safeguard his legitimate interests, such as arrangements allowing him to put his point of view, or

(b) is authorized by a law which also lays down measures to safeguard the data subject's legitimate interests.

SECTION VIII

CONFIDENTIALITY AND SECURITY OF PROCESSING

Article 16

Confidentiality of processing

Any person acting under the authority of the controller or of the processor, including the processor himself, who has access to personal data must not process them except on instructions from the controller, unless he is required to do so by law.

Article 17

Security of processing

1. Member States shall provide that the controller must implement appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.

Having regard to the state of the art and the cost of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected.

2. The Member States shall provide that the controller must, where processing is carried out on his behalf, choose a processor providing sufficient guarantees in respect of the technical security measures and organizational measures governing the processing to be carried out, and must ensure compliance with those measures.

3. The carrying out of processing by way of a processor must be governed by a contract or legal act binding the processor to the controller and stipulating in particular that:

the processor shall act only on instructions from the controller;

the obligations set out in paragraph 1, as defined by the law of the Member State in which the processor is established, shall also be incumbent on the processor.

4. For the purposes of keeping proof, the parts of the contract or the legal act relating to data protection and the requirements relating to the measures referred to in paragraph 1 shall be in writing or in another equivalent form.

SECTION IX

NOTIFICATION

Article 18

Obligation to notify the supervisory authority

1. Member States shall provide that the controller or his representative, if any, must notify the supervisory authority referred to in Article 28 before carrying out any wholly or partly automatic processing operation or set of such operations intended to serve a single purpose or several related purposes.

2. Member States may provide for the simplification of or exemption from notification only in the following cases and under the following conditions:

where, for categories of processing operations which are unlikely, taking account of the data to be processed, to affect adversely the rights and freedoms of data subjects, they specify the purposes of the processing, the data or categories of data undergoing processing, the category or categories of data subject, the recipients or categories of recipient to whom the data are to be disclosed and the length of time the data are to be stored, and/or

where the controller, in compliance with the national law which governs him, appoints a personal data protection official, responsible in particular:

= for ensuring in an independent manner the internal application of the national provisions taken pursuant to this Directive

= for keeping the register of processing operations carried out by the controller, containing the items of information referred to in Article 21(2),

thereby ensuring that the rights and freedoms of the data subjects are unlikely to be adversely affected by the processing operations.

3. Member States may provide that paragraph 1 does not apply to processing whose sole purpose is the keeping of a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person demonstrating a legitimate interest.

4. Member States may provide for an exemption from the obligation to notify or a simplification of the notification in the case of processing operations referred to in Article 8(2)(d).

5. Member States may stipulate that certain or all non-automatic processing operations involving personal data shall be notified, or provide for these processing operations to be subject to simplified notification.

Article 19

Contents of notification

1. Member States shall specify the information to be given in the notification. It shall include at least:

(a) the name and address of the controller and of his representative, if any;

(b) the purpose or purposes of the processing;

(c) a description of the category or categories of data subject and of the data or categories of data relating to them;

(d) the recipients or categories of recipient to whom the data might be disclosed;

(e) proposed transfers of data to third countries;

(f) a general description allowing a preliminary assessment to be made of the appropriateness of the measures taken pursuant to Article 17 to ensure security of processing.

2. Member States shall specify the procedures under which any change affecting the information referred to in paragraph 1 must be notified to the supervisory authority.

Article 20

Prior checking

1. Member States shall determine the processing operations likely to present specific risks to the rights and freedoms of data subjects and shall check that these processing operations are examined prior to the start thereof.

2. Such prior checks shall be carried out by the supervisory authority following receipt of a notification from the controller or by the data protection official, who, in cases of doubt, must consult the supervisory authority.

3. Member States may also carry out such checks in the context of preparation either of a measure of the national parliament or of a measure based on such a legislative measure, which define the nature of the processing and lay down appropriate safeguards.

Article 21

Publicizing of processing operations

1. Member States shall take measures to ensure that processing operations are publicized.

2. Member States shall provide that a register of processing operations notified in accordance with Article 18 shall be kept by the supervisory authority.

The register shall contain at least the information listed in Article 19(1)(a) to (e).

The register may be inspected by any person.

3. Member States shall provide, in relation to processing operations not subject to notification, that controllers or another body appointed by the Member States make available at least the information referred to in Article 19(1)(a) to (e) in an appropriate form to any person on request.

Member States may provide that this provision does not apply to processing whose sole purpose is the keeping of a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can provide proof of a legitimate interest.

Data protection

Data sharing code of practice

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Information Commissioner's Office

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Information Commissioner's foreword

As I said in launching the public consultation on the draft of this code, under the right circumstances and for the right reasons, data sharing across and between organisations can play a crucial role in providing a better, more efficient service to customers in a range of sectors – both public and private. But citizens' and consumers' rights under the Data Protection Act must be respected. Organisations that don't understand what can and cannot be done legally are as likely to disadvantage their clients through excessive caution as they are by carelessness. But when things go wrong this can cause serious harm. We want citizens and consumers to be able to benefit from the responsible sharing of information, confident that their personal data is being handled responsibly and securely.

Following the consultation, we've been able to take on board many helpful points made by our stakeholders. I am grateful to everyone who has helped to make this code as comprehensive and helpful as possible.

The code's title refers to 'data sharing'. That is to use the language of the new provisions of the Data Protection Act – and it's that legislation that requires me to produce this code. But the code isn't really about 'sharing' in the plain English sense. It's more about different types of disclosure, often involving many organisations and very complex information chains; chains that grow ever longer, crossing organisational and even national boundaries.

Information rights are higher than ever on the public agenda. That's because more and more transactions are done online – by us or about us. Shopping, entertainment, banking, communicating, socialising – but also tax, pensions, benefits, health records, council services and so on. That's not going to go away – in fact, it's only going to grow.

People want their personal data to work for them. They expect organisations to share their personal data where it's necessary to provide them with the services they want. They expect society to use its information resources to stop crime and fraud and to keep citizens safe and secure. However, people also want to know how their information is being used, who has access to it, and what that means for them. People also expect an appropriate level of choice and control, especially over their sensitive data.

This code of practice is inevitably written in general terms, providing a framework for organisations to make good quality decisions about data sharing. The code cannot provide detailed advice relevant to every situation in which data sharing takes place. If they have not done so already, organisations working in specialist areas – policing or credit referencing, for example – may need to produce their own detailed, bespoke data sharing guidance. This code of practice will help organisations to do this, and the ICO will provide whatever advice and assistance it can.

As the name suggests, this code is about 'practice' – about doing, about delivering information rights in the real world. Adopting its good practice recommendations will help organisations to work together to make the best use of the data they hold to deliver the highest quality of service, whilst avoiding the creation of the opaque, excessive and insecure information systems that can generate so much public distrust.



Christopher Graham
Information Commissioner

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About the code

This code explains how the Data Protection Act 1998 (DPA) applies to the sharing of personal data. It also provides good practice advice that will be relevant to all organisations that share personal data.

The code covers activities such as:

- a group of retailers exchanging information about former employees who were dismissed for stealing;
- a local authority disclosing personal data about its employees to an anti-fraud body;
- a primary school passing details about a child showing signs of harm to the police or a social services department;
- the police passing information about the victim of a crime to a counselling charity;
- a GP sending information about a patient to a local hospital;
- the police and immigration authorities exchanging information about individuals thought to be involved in serious crime;
- a supermarket giving information about a customer's purchases to the police;
- two departments of a local authority exchanging information to promote one of the authority's services;
- two neighbouring health authorities sharing information about their employees for fraud prevention purposes;
- a school providing information about pupils to a research organisation; and
- a retailer providing customer details to a payment processing company.

Who should use this code of practice?

Any data controller who is involved in the sharing of personal data should use this code to help them to understand how to adopt good practice. Much of the good practice advice will be applicable to public, private and third sector organisations. Some parts of the code are necessarily focused on sector-specific issues. However, the majority of the code will apply to all data sharing regardless of its scale and context.

How the code can help

Adopting the good practice recommendations in this code will help you to collect and share personal data in a way that is fair, transparent and in line with the rights and expectations of the people whose information you are sharing. The code will help you to identify the issues you need to consider when deciding whether to share personal data. It should give you confidence to share personal data when it is appropriate to do so, but should also give you a clearer idea of when it is not acceptable to share data.

Specific benefits of this code for organisations include:

- minimised risk of breaking the law and consequent enforcement action by the ICO or other regulators;
- better public trust by ensuring that legally required safeguards are in place and complied with;
- better protection for individuals when their data is shared;
- increased data sharing when this is necessary and beneficial;
- greater trust and a better relationship with the people whose information you want to share;
- reduced reputational risk caused by the inappropriate or insecure sharing of personal data;
- a better understanding of when, or whether, it is acceptable to share information without people's knowledge or consent or in the face of objection; and
- reduced risk of questions, complaints and disputes about the way you share personal data.

The code's status

The Information Commissioner has prepared and published this code under section 52 of the Data Protection Act. It is a statutory code. This means it has been approved by the Secretary of State and laid before Parliament. The code does not impose additional legal obligations nor is it an authoritative statement of the law. However, the code can be used in evidence in any legal proceedings, not just proceedings under the DPA. In determining any question arising in proceedings, courts and tribunals must take into account any part of

the code that appears to them to be relevant to that question. In carrying out any of his functions under the DPA, the Information Commissioner must also take into account any part of the code that appears to him to be relevant to those functions.

This code is the ICO's interpretation of what the DPA requires when sharing personal data. It gives advice on good practice, but compliance with our recommendations is not mandatory where they go beyond the strict requirements of the Act. The code itself does not have the force of law, as it is the DPA that places legally enforceable obligations on organisations.

Organisations may find alternative ways of meeting the DPA's requirements and of adopting good practice. However, if they do nothing then they risk breaking the law. The ICO cannot take enforcement action over a failure to adopt good practice or to act on the recommendations set out in this code unless this in itself constitutes a breach of the DPA.

Although the DPA sets out the bare legal requirements to be considered when sharing personal data, it provides no guidance on the practical measures that could be taken to comply with them. This code helps to plug that gap.

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What do we mean by 'data sharing'?

By 'data sharing' we mean the disclosure of data from one or more organisations to a third party organisation or organisations, or the sharing of data between different parts of an organisation. Data sharing can take the form of:

- a reciprocal exchange of data;
- one or more organisations providing data to a third party or parties;
- several organisations pooling information and making it available to each other;
- several organisations pooling information and making it available to a third party or parties;
- exceptional, one-off disclosures of data in unexpected or emergency situations; or
- different parts of the same organisation making data available to each other.

Some data sharing doesn't involve personal data, for example where only statistics that cannot identify anyone are being shared. Neither the Data Protection Act (DPA), nor this code of practice, apply to that type of sharing.

The code covers the two main types of data sharing:

- systematic, routine data sharing where the same data sets are shared between the same organisations for an established purpose; and
- exceptional, one-off decisions to share data for any of a range of purposes.

Different approaches apply to these two types of data sharing and the code of practice reflects this. Some of the good practice recommendations that are relevant to systematic, routine data sharing are not applicable to one-off decisions about sharing.

'Systematic' data sharing

This will generally involve routine sharing of data sets between organisations for an agreed purpose. It could also involve a group of organisations making an arrangement to 'pool' their data for specific purposes.

Ad hoc or 'one-off' data sharing

Much data sharing takes place in a pre-planned and routine way. As such, it should be governed by established rules and procedures. However, organisations may also decide, or be asked, to share data in situations which are not covered by any routine agreement. In some cases this may involve a decision about sharing being made in conditions of real urgency, for example in an emergency situation.

Sharing with a 'data processor'

This code of practice is mainly about sharing personal data between data controllers – i.e. where both organisations determine the purposes for which and the manner in which the personal data is processed.

However, there is a form of data sharing where a data controller shares data with another party that processes personal data on its behalf. In the DPA, these organisations are known as 'data processors'.

The DPA draws a distinction between one data controller sharing personal data with another, and a data controller sharing data with its data processor. The DPA requires that a data controller using a data processor must ensure, in a written contract, that:

- the processor only acts on instructions from the data controller; and
- it has security in place that is equivalent to that imposed on the data controller by the seventh data protection principle.

Therefore a data processor involved in data sharing doesn't have any direct data protection responsibilities of its own; they are all imposed on it through its contract with the data controller.

Sharing within organisations

When we talk about 'data sharing' most people will understand this as sharing data between organisations. However, the data protection principles also apply to the sharing of information within an organisation – for example between the different departments of a local authority or financial services company. Whilst not all the advice in this code applies to sharing within organisations, much of it will, especially as the different parts of the same organisations can have very different approaches to data protection, depending on their culture and functions.

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Data sharing and the law

Before sharing any personal data you hold, you will need to consider all the legal implications of doing so. Your ability to share information is subject to a number of legal constraints which go beyond the requirements of the Data Protection Act (DPA). There may well be other considerations such as specific statutory prohibitions on sharing, copyright restrictions or a duty of confidence that may affect your ability to share personal data. A duty of confidence may be stated, or it may be implied by the content of the information or because it was collected in circumstances where confidentiality is expected – medical or banking information, for example. You may need to seek your own legal advice on these issues.

If you wish to share information with another person, whether by way of a one-off disclosure or as part of a large-scale data sharing arrangement, you need to consider whether you have the legal power or ability to do so. This is likely to depend, in part, on the nature of the information in question – for example whether it is sensitive personal data. However, it also depends on who ‘you’ are, because your legal status also affects your ability to share information – in particular it depends on whether you are a public sector body or a private/third sector one.

The public sector

Most public sector organisations, other than government departments headed by a Minister of the Crown (which have common law powers to share information), derive their powers entirely from statute – either from the Act of Parliament which set them up or from other legislation regulating their activities. Your starting point in deciding whether any data sharing initiative may proceed should be to identify the legislation that is relevant to your organisation. Even if this does not mention data sharing explicitly, and usually it will not do so, it is likely to lead you to the answer to this question.

The relevant legislation will probably define the organisation’s functions in terms of its purposes, the things that it must do, and the powers which the organisation may exercise in order to achieve those purposes, the things that it may do. So it is necessary to identify where the data sharing in question would fit, if at all, into the range of things that the organisation is able to do. Broadly speaking, there are three ways in which it may do so:

- **Express obligations** – Occasionally, a public body will be legally obliged to share particular information with a named organisation. This will only be the case in highly specific circumstances but, where such an obligation applies, it is clearly permissible to share the information.

- **Express powers** – Sometimes, a public body will have an express power to share information. Again, an express power will often be designed to permit disclosure of information for certain purposes. Express statutory obligations and powers to share information are often referred to as “gateways”.
- **Implied powers** – Often, the legislation regulating a public body’s activities is silent on the issue of data sharing. In these circumstances it may be possible to rely on an implied power to share information derived from the express provisions of the legislation. This is because express statutory powers may be taken to authorise the organisation to do other things that are reasonably incidental to those which are expressly permitted. To decide if you can rely on an implied power, you will need to identify the activity to which the proposed data sharing would be “reasonably incidental”, and then check that the organisation has the power to engage in that activity.

Whatever the source of an organisation’s power to share information, you must check that the power covers the particular disclosure or data sharing arrangement in question – otherwise, you must not share the information unless, in the particular circumstances, there is an overriding public interest in a disclosure taking place. This might be the case where an NHS Trust breaches a duty of confidentiality because a doctor believes that a patient has been involved in serious crime. Whilst a disclosure in the public interest may be defensible in a particular case, this does not constitute a legal power to share data.

Private and third sector organisations

The legal framework that applies to private and third sector organisations differs from that which applies to public sector organisations, which may only act within their statutory powers. However, all bodies must comply fully with the data protection principles.

In some private sector contexts there are legal constraints on the disclosure of personal data. However, most private and third sector organisations have a general ability to share information provided this does not breach the DPA or any other law. It is advisable for a company to check its constitutional documents, such as its memorandum and articles of association, to make sure there are no restrictions that would prevent it from sharing personal data in a particular context.

Private and third sector organisations should have regard to any industry-specific regulation or guidance about handling individuals’ information as this may affect the organisation’s ability to share information. They should also be aware of the legal issues that can arise when sharing personal data with public sector bodies. This becomes more of an issue as private and third sector bodies are carrying out a wider range of traditionally public sector functions.

Human rights

Public authorities must comply with the Human Rights Act 1998 (HRA) in the performance of their functions. The HRA also applies to organisations in the private sector insofar as they carry out functions of a public nature. Where the HRA applies, organisations must not act in a way that would be incompatible with rights under the European Convention on Human Rights.

Article 8 of the Convention, which gives everyone the right to respect for his private and family life, his home and his correspondence, is especially relevant to sharing personal data. Article 8 is not an absolute right – public authorities are permitted to interfere with it if it is lawful and proportionate to do so.

It is advisable to seek specialist advice if the disclosure or data sharing arrangement you are proposing engages Article 8 or any other Convention right. However, if you disclose or share personal data only in ways that comply with the DPA, the sharing or disclosure of that information is also likely to comply with the HRA.

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Deciding to share personal data

Factors to consider

When deciding whether to enter into an arrangement to share personal data (either as a provider, a recipient or both) you need to identify the objective that it is meant to achieve. You should consider the potential benefits and risks, either to individuals or society, of sharing the data. You should also assess the likely results of not sharing the data. You should ask yourself:

- **What is the sharing meant to achieve?** You should have a clear objective, or set of objectives. Being clear about this will allow you to work out what data you need to share and who with. It is good practice to document this.
- **What information needs to be shared?** You shouldn't share all the personal data you hold about someone if only certain data items are needed to achieve your objectives. For example, you might need to share somebody's current name and address but not other information you hold about them.
- **Who requires access to the shared personal data?** You should employ 'need to know' principles, meaning that other organisations should only have access to your data if they need it, and that only relevant staff within those organisations should have access to the data. This should also address any necessary restrictions on onward sharing of data with third parties.
- **When should it be shared?** Again, it is good practice to document this, for example setting out whether the sharing should be an on-going, routine process or whether it should only take place in response to particular events.
- **How should it be shared?** This involves addressing the security surrounding the transmission or accessing of the data and establishing common rules for its security.
- **How can we check the sharing is achieving its objectives?** You will need to judge whether it is still appropriate and confirm that the safeguards still match the risks.
- **What risk does the data sharing pose?** For example, is any individual likely to be damaged by it? Is any individual likely to object? Might it undermine individuals' trust in the organisations that keep records about them?
- **Could the objective be achieved without sharing the data or by anonymising it?** It is not appropriate to use personal data to plan service provision, for example, where this could be done with information that does not amount to personal data.

- **Do I need to update my notification?** You need to ensure that the sharing is covered in your register entry.
- **Will any of the data be transferred outside of the European Economic Area (EEA)?** If so, you need to consider the requirements of the eighth principle of the Data Protection Act (DPA). For more detailed guidance on this area see: www.ico.gov.uk

Conditions for processing

The first data protection principle says that organisations have to satisfy one or more 'conditions' in order to legitimise their processing of personal data, unless an exemption applies. Organisations processing sensitive personal data, for example information about a person's health, will need to satisfy a further, more exacting condition. It is important to be clear that meeting a condition for processing will not in itself ensure that the sharing of personal data is fair or lawful. These issues need to be considered separately.

Consent (explicit consent for sensitive personal data) is one of the conditions the DPA provides to legitimise processing. The Data Protection Directive on which the UK's DPA is based defines 'the data subject's consent' as:

'any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed'.

There must therefore be some form of active communication where the individual knowingly indicates consent. Whilst consent will provide a basis on which organisations can share personal data, the ICO recognises that it is not always achievable or even desirable. If you are going to rely on consent as your condition you must be sure that individuals know precisely what data sharing they are consenting to and understand its implications for them. They must also have genuine control over whether or not the data sharing takes place. It is bad practice to offer individuals a 'choice' if the data sharing is going to take place regardless of their wishes, for example where it is required by statute or is necessary for the provision of an essential service.

Consent or explicit consent for data sharing is most likely to be needed where:

- confidential or particularly sensitive information is going to be shared without a clear legal basis for doing so;
- the individual would be likely to object should the data be shared without his or her consent; or
- the sharing is likely to have a significant impact on an individual or group of individuals.

The other conditions that provide a basis for processing non-sensitive personal data include:

- The processing is necessary:
 - in relation to a contract which the individual has entered into; or
 - because the individual has asked for something to be done so they can enter into a contract.
- The processing is necessary because of a legal obligation that applies to you (except an obligation imposed by a contract).
- The processing is necessary to protect the individual's "vital interests". This condition only applies in cases of life or death, such as where an individual's medical history is disclosed to a hospital's A&E department treating them after a serious road accident.
- The processing is necessary for administering justice, or for exercising statutory, governmental, or other public functions.
- The processing is in accordance with the "legitimate interests" condition.

The 'legitimate interests' condition provides grounds to process personal data in a situation where an organisation needs to do so for the purpose of its own legitimate interests or the legitimate interests of the third party that the information is disclosed to. This condition cannot be satisfied if the processing is unwarranted because it prejudices the rights and freedoms or legitimate interests of the individual whose data is being processed. This condition cannot legitimise the processing of sensitive personal data.

For example, a catalogue company providing extreme sports accessories wants to sell a list of customer names and addresses onto a travel agent that offers adventure holidays. In this case the legitimate interests condition is likely to be the catalogue company's basis to process this data. The data shared is not sensitive personal data and their use of the information in this scenario is unlikely to prejudice the rights and freedoms or legitimate interests of the customers. Having a condition for processing will not ensure that the processing will meet the other requirements of the DPA. The catalogue company needs to consider the fairness requirements of the Act and would need to comply with the other principles.

The conditions for processing sensitive personal data are more difficult to satisfy. For example if you want to process medical data you have to satisfy a condition from the list above and also a more stringent sensitive data condition – one of which specifically legitimises processing of health data for medical purposes, including the provision of treatment and medical research. For more details of all the conditions for processing and the circumstances in which they apply see the Guide to data protection: www.ico.gov.uk

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Fairness and transparency

The Data Protection Act (DPA) requires that personal data be processed fairly. This means that people should generally be aware of which organisations are sharing their personal data and what it is being used for. In a broader sense, fairness also requires that where personal data is shared, this happens in a way that is reasonable and that people would be likely to expect and would not reasonably object to if given the chance. You need to think about this before you first share any personal data. This applies equally to routine data sharing or a single, one-off disclosure.

Privacy notices

The ICO has already produced comprehensive good practice guidance on the drafting and distribution of privacy notices – sometimes known as fair processing notices – in our Privacy notices code of practice. This is available at: www.ico.gov.uk

Much of the guidance on privacy notices is particularly relevant in data sharing contexts because of the need to ensure that people know which organisations are sharing their personal data and what it is being used for.

In a data sharing context, a privacy notice should at least tell the individual:

- who you are;
- why you are going to share personal data; and
- who you are going to share it with – this could be actual named organisations or types of organisation.

You should provide a privacy notice when you first collect a person's personal data. If you have already collected their personal data, then you need to provide them with the information above as soon as you decide that you're going to share their data or as soon as possible afterwards.

In some cases a single privacy notice will be enough to inform the public of all the data sharing that you carry out. This might be the case where personal data is being shared with a number of organisations for marketing purposes. However, if you are engaged in various significant data sharing activities, it is good practice to provide information about each one separately. This will allow you to give much more tailored information, and to target it at the individuals affected by the particular sharing. There is a danger that

individuals affected by data sharing will not be able to find the information they need if an organisation only publishes one all-encompassing privacy notice.

Data sharing arrangements can change over time – for example where a law is introduced that requires an organisation to take part in a new data sharing operation. As a result, it is good practice to review your privacy notice regularly so that it continues to reflect accurately the data sharing you are involved in. Any significant changes to your privacy notice need to be publicised appropriately – depending primarily on the impact of the changes on individuals.

Telling individuals about data sharing

The DPA leaves it open as to how, or whether, you have to provide a privacy notice. In some cases it is enough just to have a privacy notice available so people can access it if they want to. This approach is acceptable where the data sharing is something people are likely to expect or be aware of already, and to which people are unlikely to object.

For example, a user of an online retail site is aware through the nature of the transaction that the retail site will disclose certain information to a secure payment service and to a courier service in order to take payment for goods and arrange their delivery. Where this is already clear, there is no need to inform the individual actively that personal data is being shared.

In other cases it is good practice to communicate a privacy notice actively. This is a legal obligation where a failure to do so would result in unfairness to the individual. By 'communicate actively' we mean taking a positive action to provide a privacy notice, for example by sending a letter, reading out a script or distributing an email.

A good way to decide whether to communicate a notice actively is to try to anticipate whether the individual would expect their personal data to be shared or would object if they knew about it.

The need to communicate a privacy notice actively is strongest where:

- you are sharing sensitive personal data; or
- the data sharing is likely to be unexpected or objectionable; or
- sharing the data, or not sharing it, will have a significant effect on the individual; or
- the sharing is particularly widespread, involving organisations individuals might not expect; or
- the sharing is being carried out for a range of different purposes.

Who should tell the individual?

Data sharing typically involves personal data being disclosed between a number of organisations, all of whom have a responsibility to comply with the DPA, including its fairness provisions.

The most important thing is to ensure that the organisations involved in data sharing work together to ensure that the individuals concerned know who has, or will have, their data and what it is being used for, or will be used for. The primary responsibility for doing this falls to the organisation that collected the data initially. However, it is good practice for all the organisations involved to ensure that, throughout the data sharing process, individuals remain aware of who has their personal data and what it is being used for. This is particularly important where the data has been disclosed to another organisation or where it is being used for a different purpose. It is good practice for recipients of personal data to check the privacy notice of the organisation that collected the data originally, to check whether it describes the types of recipient and their use of the data.

Sharing without the individual's knowledge

The general rule in the DPA is that individuals should, at least, be aware that personal data about them has been, or is going to be, shared – even if their consent for the sharing is not needed. However, in certain limited circumstances the DPA provides for personal data, even sensitive data, to be shared without the individual even knowing about it.

You can share without an individual's knowledge in cases where, for example, personal data is processed for:

- the prevention or detection of crime;
- the apprehension or prosecution of offenders; or
- the assessment or collection of tax or duty.

An organisation processing personal data for one of these purposes is exempt from the fairness requirements of the DPA, but only to the extent that applying these provisions would be likely to prejudice the crime and taxation purposes. For example, the police might ask an organisation to give them information about an ex-employee who they suspect of being involved in a serious assault. If informing the ex-employee that they have given the police this information would tip the individual off and be likely to prejudice the investigation, because the suspect might abscond for example, then the organisation could rely on the exemption and wouldn't have to tell the individual about the disclosure of information.

The exemptions are explained in our Guide to data protection:

www.ico.gov.uk

In some cases the sharing of data is required by law, for example under the Money Laundering Regulations 2007 – these allow financial institutions to share personal data with law enforcement agencies in certain circumstances. Such legal requirements override an individual's consent or objection. However, it is still good practice, and may still be a legal obligation, to explain in general terms to all individuals the circumstances in which their personal data may be shared and the likely consequences of this.

It is also good practice to tell the individual as soon as you can after the risk of prejudice has passed that information about them has been shared. This will not be practicable where the organisation providing the information is unaware of the progress or outcome of an investigation. Secrecy may be maintained where this would be likely to prejudice future policing operations, for example.

It is good practice to document any decisions you have taken regarding the sharing of personal data without the individual's knowledge, including the reasons for those decisions. This is important in case there is a challenge to your decision to share data, for example in the form of a complaint to the ICO or a claim for compensation in the courts.

Ad hoc or 'one off' sharing

As explained above, the exemptions in the DPA can provide a basis for ad hoc sharing to take place legally in certain circumstances.

Sometimes there may be a need to share very sensitive information, even without the individual's knowledge. Acting appropriately in situations like this depends primarily on the exercise of professional judgement. However, disclosures of personal data in situations like this are still subject to the DPA. The ICO will give due weight to compliance with authoritative professional guidance in determining whether there has been a breach of the DPA. Therefore it is very much in the interests of organisations and individual employees to be aware of any professional guidance or ethical rules that are likely to be relevant to the type of decisions about disclosing personal data that they may be asked to make. It may not always be possible to document the sharing in an emergency or time dependent situation, however it is good practice to make a record as soon as possible, detailing the circumstances, what information was shared and explaining why the disclosure took place.

Mergers and takeovers

Where an organisation is taken over, merged, abolished or loses responsibility for carrying out a particular function, personal data might need to be shared in a way that was not originally envisaged by the organisation or individuals themselves. The DPA does not prevent organisations sharing data in these circumstances. The key point is that the use of personal data must continue to be fair.

If you know you are going to be taken over, merged with another organisation or that you are losing responsibility for carrying out a particular function, you should take steps to confirm what personal data you currently hold and establish the purposes for which the information was originally obtained.

When it becomes clear that the takeover or merger is going ahead you should consider when and how you will make individuals aware of what is happening. In some cases publicising the change will be sufficient, for example by taking out an advert in a local newspaper. In other situations it will be appropriate for an organisation to contact individuals directly to let them know what is happening. This might be necessary, for example where you have a customer relationship with individuals or where the data you hold is sensitive. In these cases there may be a particular need to reassure people that the information will still be used for the same purposes and will be kept securely.

The information you provide should identify the new organisation and remind individuals about what you hold and how it is used. This might be achieved by providing individuals with a copy of the privacy notice. The important point is that individuals understand who is holding their data and are reassured that it will continue to be used in the way they have been told about and expect.

In some cases individuals will have no real choice about whether their details are passed onto a new organisation. This might be, for example, when responsibility for providing a service they receive from the Council is passed to another organisation. In other cases individuals will have a choice about whether they continue to deal with an organisation after a merger or takeover. Where individuals do have a choice about their details being used by a new organisation, this should be made clear.

It is important that the new organisation processes individuals' data in line with their reasonable expectations. For example, if an individual has previously opted out of direct marketing this objection should be passed on and continue to be respected by the new organisation.

For example, two animal welfare charities decide to merge. They write to their members and tell them about the merger. The letter reassures members that their personal data will continue to be used for the same purposes. They also provide members with a print out of the information they currently hold about them and the marketing preferences they have on file. They ask members to let them know if any of the information needs updating.

On a practical level it can be difficult to manage records after a merger or takeover where an organisation is using different databases, or trying to integrate different systems. It is particularly important in this period that you consider the requirements of the DPA. This will include taking appropriate steps to ensure records are accurate and up to date, that you adhere to a consistent retention policy for all records and that you have appropriate security in place.

Buying and selling databases

We have produced specific guidance for organisations wanting to buy or sell customer databases: www.ico.gov.uk

Emergency response planning

In emergency response situations where there is less time to consider issues in detail it can be particularly difficult to make judgements about whether information can be shared. The key point is that the DPA does not prevent organisations sharing personal data where it is appropriate to do so. Factoring in the risks involved in not sharing data is particularly relevant in this situation.

Where possible, organisations likely to be involved in responding to emergency situations should consider the types of data they are likely to need to share in advance. This should help to establish what relevant data each organisation holds and help prevent any delays in an emergency.

For example, the police, the fire service and local councils get together to plan for identifying and assisting vulnerable people in their area in an emergency situation. As part of the process they determine what type of personal data they each hold and put in place a data sharing agreement setting out what they will share and how they will share it in the event of an emergency.

For more detailed guidance in this area see 'Data Protection and Sharing – Guidance for Emergency Planners and Responders': www.cabinetoffice.gov.uk



Security

The Data Protection Act (DPA) requires organisations to have appropriate technical and organisational measures in place when sharing personal data. Organisations may be familiar with protecting information they hold themselves, but establishing appropriate security in respect of shared information may present new challenges.

It is good practice to take the following measures in respect of information that you share with other organisations, or that other organisations share with you.

- Review what personal data your organisation receives from other organisations, making sure you know its origin and whether any conditions are attached to its use.
- Review what personal data your organisation shares with other organisations, making sure you know who has access to it and what it will be used for.
- Assess whether you share any data that is particularly sensitive. Make sure you afford this data a suitably high level of security.
- Identify who has access to information that other organisations have shared with you; 'need to know' principles should be adopted. You should avoid giving all your staff access to shared information if only a few of them need it to carry out their job.
- Consider the effect a security breach could have on individuals.
- Consider the effect a security breach could have on your organisation in terms of cost, reputational damage or lack of trust from your customers or clients. This can be particularly acute where an individual provides their data to an organisation, but a third party recipient organisation then loses the data.

You should aim to build a culture within your organisation where employees know and understand good practice, in respect of 'its own' data and that received from another organisation. Staff should be aware of security policies and procedures and be trained in their application. In particular you will need to:

- design and organise your security to fit the type of personal data you disclose or receive and the harm that may result from a security breach;
- be clear about which staff members in the organisations involved in the sharing are responsible for ensuring information security. They should meet regularly to ensure appropriate security is maintained;

- have appropriate monitoring and auditing procedures in place; and
- be ready to respond to any failure to adhere to a data sharing agreement swiftly and effectively.

Physical security

Do you have good quality access control systems for your premises?

How are visitors supervised?

Is paper based information stored and transferred securely?

Are laptops and removable media such as discs and memory sticks locked away at night?

Do you dispose of paper waste securely, for example by shredding?

Do you advise staff on how to use their mobile phones securely and minimise the risk of them being stolen?

Technical security

Is your technical security appropriate to the type of system you have, the type of information you hold and what you do with it?

If you have staff that work from home, do you have security measures in place to ensure that this does not compromise security?

How is encryption of personal data implemented and managed?

Have you identified the most common security risks associated with using a web-product – e.g. a website, web application or mobile application?

How do you control access to your systems?

Do you set privileges to information based on people's need to know?

What measures are in place for the security of information in transit?

When personal data is shared, it is good practice for the organisation disclosing it to make sure that it will continue to be protected with adequate security by any other organisations that will have access to it. The organisation disclosing the information should ensure that the receiving organisation understands the nature and sensitivity of the information. It is good practice to take reasonable steps to ensure that those security measures are in place, particularly by ensuring that an agreed set of security standards has been signed up to by all the parties involved in a data sharing agreement. Please note, though, that the organisations the data is disclosed to will take on their own legal responsibilities in respect of the data, including its security.

Difficulties can arise when the organisations involved have different standards of security and security cultures or use different protective marking systems. It can also be difficult to establish common security standards where there are differences in organisations' IT systems and procedures. Any such problems should be resolved before any personal data is shared.

There should be clear instructions about the security steps which need to be followed when sharing information by a variety of methods, for example phone, fax, email or face to face.



Governance

Responsibility

The various organisations involved in a data sharing initiative will each have their own responsibilities, and liabilities, in respect of the data they disclose or have received. The issues the data sharing is intended to address may be very sensitive ones, and the decisions staff members may have to take can call for great experience and sound judgement. Therefore it is good practice for a senior, experienced person in each of the organisations involved in the sharing to take on overall responsibility for information governance, ensuring compliance with the law, and providing advice to staff faced with making decisions about data sharing.

Data sharing agreements

Data sharing agreements – sometimes known as ‘data sharing protocols’ – set out a common set of rules to be adopted by the various organisations involved in a data sharing operation. These could well form part of a contract between organisations. It is good practice to have a data sharing agreement in place, and to review it regularly, particularly where information is to be shared on a large scale, or on a regular basis.

A data sharing agreement should, at least, document the following issues:

- the purpose, or purposes, of the sharing;
- the potential recipients or types of recipient and the circumstances in which they will have access;
- the data to be shared;
- data quality – accuracy, relevance, usability etc;
- data security;
- retention of shared data;
- individuals’ rights – procedures for dealing with access requests, queries and complaints;
- review of effectiveness/termination of the sharing agreement; and
- sanctions for failure to comply with the agreement or breaches by individual staff.

Section 14 of this document sets out the key elements of a data sharing agreement.

Privacy impact assessments (PIAs)

Before entering into any data sharing arrangement, it is good practice to carry out a privacy impact assessment. This will help you to assess the benefits that the data sharing might bring to particular individuals or society more widely. It will also help you to assess any risks or potential negative effects, such as an erosion of personal privacy, or the likelihood of damage, distress or embarrassment being caused to individuals. As well as harm to individuals, you may wish to consider potential harm to your organisation's reputation which may arise if data is shared inappropriately, or not shared when it should be. Privacy impact assessments are mandatory for UK Central Government Departments when introducing certain new processes involving personal data. Further information on privacy impact assessments can be found on our website at: www.ico.gov.uk

Please see the Ministry of Justice's guidance for Central Government Departments on PIAs at: www.justice.gov.uk

Data standards

The Data Protection Act (DPA) principles (see Annex 1) provide a framework which organisations involved in data sharing should use to develop their own information governance policies. It is important to have procedures in place to maintain the quality of the personal data you hold, especially when you intend to share data. When you are planning to share data with another organisation, you need to consider all the data quality implications.

When sharing information, you should consider the following issues:

- **Make sure that the format of the data you share is compatible with the systems used by both organisations.**

Different organisations may use very different IT systems, with different hardware and software and different procedures for its use. This means that it can be very difficult to 'join' systems together in order to share personal data properly. These technical issues need to be given due weight when deciding whether, or how, to share personal data.

Organisations may also record the same information in different ways. For example, a person's date of birth can be recorded in various formats. This can lead to records being mismatched or becoming corrupted. There is a risk that this will cause detriment to individuals if holding an incomplete record means that you do not provide services correctly. Before sharing information you must make sure that the organisations involved have a common way of recording key information, for example by deciding on a standard format for recording people's names. A relatively common problem here is the recording of names which contain non-Latin characters. Each organisation might have its own way of recording these, depending on the capabilities of its system. If you cannot establish a common standard for recording information, you must develop a reliable means of converting the information.

If the characters in a dataset are encoded using a different system, they might not transfer correctly. You should ensure that the data is compatible with both systems, especially in cases which are more likely to use non-standard characters.

Given the problems of interoperability that can arise, it is good practice for organisations that are likely to be involved in data sharing to require common data standards as part of their procurement exercises. IT suppliers should be made aware of these requirements.

The government data standards catalogue is here:

www.cabinetoffice.gov.uk

For local government: <http://standards.esd.org.uk>

For the NHS: www.connectingforhealth.nhs.uk

- **Check that the information you are sharing is accurate before you share it.**

Before you share data you should take steps to check its accuracy. After the information has been shared it can be difficult to have it amended, so you should do as much as you can prior to disclosure. The steps you take should depend on the nature of the data involved. If you are sharing sensitive data and any inaccuracy would potentially harm the data subject, you will need to take extra care to ensure that the information is correct.

It is good practice to check from time to time whether the information being shared is of good quality. For example, a sample of records could be looked at to make sure the information contained in them is being kept up to date. The larger the scale of the data sharing, the more rigorous the sampling exercise should be. It is a good idea to show the records to the people they are about so that the quality of information on them can be checked. Although this may only reveal deficiencies in a particular record, it could indicate wider systemic failure that can then be addressed.

- **Establish ways for making sure inaccurate data is corrected by all the organisations holding it.**

You should ensure that procedures are in place for amending data after it has been shared. This might be because the data subject notifies you of an inaccuracy, or because they have asked you to update their details. The action you need to take will depend on the circumstances of each case. If the data is intended for ongoing use then it could be necessary for all the organisations holding it to amend it.

If several organisations are sharing information in a partnership, they should establish who is responsible for maintaining the accuracy of the data and responding to any complaints or requests for amendment.

- **Agree common retention periods and deletion arrangements for the data you send and receive.**

The various organisations sharing personal data should have an agreement about what should happen once the need to use the data has passed. Where the information is held electronically the information should be deleted, and a formal note of the deletion should be sent. Where the particular issue that the data sharing was intended to deal with has been resolved, all the organisations involved should delete their copies of the information unless there is a requirement to retain it for another purpose, for example archiving. Paper records can cause particular problems. It can be easy to overlook the presence of old paper records in archives or filing systems – and they may well contain personal data subject to the DPA. Once the need to retain them has passed, paper records should be securely destroyed or returned to the organisation they came from.

The various organisations involved in a data sharing initiative may need to set their own retention periods for information, perhaps because they work to different statutory retention periods. However, if shared data is no longer needed for the purpose for which it was shared, then all the organisations it was shared with should delete it. However, the organisation, or organisations, that collected the data in the first place may be able, or be required, to retain the original data for another legitimate purpose.

Some information will be subject to a statutory retention period and this must be adhered to. You must make sure that any organisation that has a copy of the information also deletes it in accordance with statute.

If you can remove all identifying information from a dataset so that it no longer constitutes personal data, then it can be retained indefinitely.

- **Train your staff so that they know who has the authority to share personal data, and in what circumstances this can take place.**

It is essential to provide training on data sharing to staff that are likely to make significant decisions about data sharing or have access to shared data. The nature of the training will depend on their role in respect of the sharing of personal data. It can be incorporated into any training you already give on data protection, security, or legal obligations of staff.

Different types of staff involved in data sharing will have different training needs, depending on their role. Those who:

- plan and make decisions about systematic sharing;
- administer systems; or
- make decisions in one off situations

will each have different requirements based on their responsibilities.

The focus of the training should be enabling staff to make informed decisions about whether or how to share data, and how to treat the data they are responsible for.

People who have overall responsibility for data sharing need to understand:

- the relevant law surrounding data sharing, including the DPA;
- any relevant professional guidance or ethical rules;
- data sharing agreements and the need to review them;
- how different information systems work together;
- security and authorising access to systems holding shared data;
- how to conduct data quality checks; and
- retention periods for shared data.

They also need the seniority and influence to make authoritative decisions about data sharing.

Reviewing your data sharing arrangements

Once you have a data sharing arrangement in place you should review it on a regular basis. This is because changes can occur and they need to be reflected in your arrangements to ensure that such sharing can still be justified. If it cannot be justified, it should stop.

You should ask yourself the following key questions regularly:

- Is the data still needed? You may find that the aim of the data sharing has been achieved and that no further sharing is necessary. On the other hand, you may find that the data sharing is making no impact upon your aim and therefore the sharing is no longer justified.
- Do your privacy notice and any data sharing agreements you have in place still explain the data sharing you are carrying out accurately? Please see the fairness and transparency section of this code and section 14 on data sharing agreements for further information.

- Are your information governance procedures still adequate and working in practice? All the organisations involved in the sharing should check:
 - whether it is necessary to share personal data at all, or whether anonymised information could be used instead;
 - that only the minimum amount of data is being shared and that the minimum number of organisations, and their staff members, have access to it;
 - that the data shared is still of appropriate quality;
 - that retention periods are still being applied correctly by all the organisations involved in the sharing;
 - that all the organisations involved in the sharing have attained and are maintaining an appropriate level of security; and
 - that staff are properly trained and are aware of their responsibilities in respect of any shared data they have access to.
- Have you checked that you are still providing people with access to all the information they're entitled to, and that you're making it easy for them to access their shared personal data?
- Have you checked that you are responding to people's queries and complaints properly and are analysing them to make improvements to your data sharing arrangements?

If significant changes are going to be made to your data sharing arrangements, then those changes need to be publicised appropriately. This can be done by updating websites, sending emails directly to people or, if appropriate, placing advertisements in local newspapers.

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Individuals' rights

The Data Protection Act (DPA) gives individuals certain rights over their personal data. These include:

- the right to access personal data held about them;
- the right to know how their data is being used; and
- the right to object to the way their data is being used.

Access to information

Organisations are required by law to give people access to data about them in a permanent form. For most records, you can charge a fee of £10. You can find more advice on responding to requests in our Guide to data protection: www.ico.gov.uk

- You should provide clear information for individuals about how they can access their data and make this process as straightforward as possible.
- You must be able to locate and access personal data you are responsible for promptly in order to respond to requests.
- When you receive a request from an individual for their personal data you must respond to the request promptly and in any event within 40 days.

When several organisations are sharing personal data it may be difficult for an individual to decide who they should make a request for information to. You should provide clear information about the way in which individuals can make requests. It is good practice to provide a single point for individuals to direct their access requests to, allowing them to access the data that has been shared between several organisations without making multiple requests. This should also allow individuals to pay a flat fee of £10, rather than paying a number of organisations £10 each.

It is good practice to provide ways for people to access and check their own data without needing to make a formal request. You could do this by setting up facilities to allow records to be viewed online, if this can be done securely, or by showing people their data when you are in contact with them. Providing these options could save you time responding to formal requests and help to ensure the data you hold is accurate and up to date.

Where personal data is shared between several bodies it can be difficult to determine who is responsible for the data and what exactly is held. It is very important that organisations sharing data

manage their records well to ensure they can locate and provide all the data held about a person when they receive an access request.

When responding to a request for personal data an organisation is also required by law to provide a description of the purposes for which the data is held and details of the recipients or types of recipients that the data is disclosed to. Providing this information is particularly important where data is being shared, so that individuals are reminded about the ways their information is being used and disclosed. It also makes it easier for them to take action where they think an organisation has disclosed their data to another organisation inappropriately.

You are also required to provide any information you have about the source of the data you hold. In some cases this information may have been provided by another individual. This might be the case, for example, where a child's social work file contains information provided by a concerned neighbour. In cases like this, there is likely to be a clear basis for information about the source to be withheld. Our guidance on 'Subject access and other people's information' contains more detail on this subject: www.ico.gov.uk

In certain cases you may be responsible for replying to a request for personal data which was shared with you but you may not be in a position to make the judgement about whether a particular exemption to withhold data should be applied. For example, you may be concerned about the impact of releasing a report containing information prepared by a doctor about an individual's health. The decision about whether disclosing this information could cause serious harm to the individual would need to be made by a medical professional. In this instance you would need to seek advice from the doctor who prepared the report or another medical professional if this is not possible.

Individuals' objections

Individuals can object where the use of their personal data is causing them substantial, unwarranted damage or substantial, unwarranted distress. The objection can be to a particular use of information or to the fact an organisation is holding their personal data at all. Organisations are required by law to respond to individuals who object in writing to the way their personal data is being used. However they do not need to comply with the request unless there is damage or distress and this is substantial and unwarranted.

You could avoid objections by providing individuals with clear information about the basis on which you are sharing their personal data and the ways it will be used.

- When you receive a request from an individual to stop using their information you must respond to them within 21 days to confirm what action you intend to take.
- If you consider their objection unwarranted you should let them know and provide clear reasoning for your decision.

- If you are taking action to comply with the individual's request you should explain the steps you are going to take and provide a timescale.

In the DPA the right to object is linked to the likelihood of substantial and unwarranted damage or distress being caused. This means that this section of the DPA does not provide the individual with an unqualified right to stop their personal data being shared.

Queries and complaints

Individuals may have queries or complaints about how their personal data is being shared, particularly where they think the data is wrong or that the sharing is having an adverse effect on them. It is good practice to have procedures in place to deal with any queries or comments you receive in a quick and helpful way, for example by having a single point of contact for members of the public. It is good practice to analyse the comments you receive in order to develop a clearer understanding of public attitudes to the data sharing you carry out. Answering individuals' queries can also allow you to provide further information about your data sharing, in addition to what's contained in your privacy notice.

If you inform people about your data sharing and then receive a significant number of objections, negative comments or other expressions of concern, you should review the data sharing in question. In particular, you should analyse the concerns raised and decide whether the sharing can go ahead in the face of public opposition, for example because you are under a legal obligation to share the data. Alternatively, you may need to reduce the amount of data you share or share it with fewer organisations. In large scale data sharing operations, it is good practice to set up focus groups to explore individuals' concerns and to develop more publicly acceptable ways of dealing with the issues that the data sharing was intended to address.

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Things to avoid

When sharing personal data there are some practices that you should avoid. These practices could lead to regulatory action:

- Misleading individuals about whether you intend to share their information. For example, not telling individuals you intend to share their personal data because you think they may object.
- Sharing excessive or irrelevant information about people. For example, routinely sharing details about individuals that are not relevant to the purpose that the information is being shared for.
- Sharing personal data when there is no need to do so – for example where anonymised statistical information can be used to plan service provision.
- Not taking reasonable steps to ensure that information is accurate and up to date before you share it. For example, failing to update address details before sharing information, leading to individuals being pursued at the wrong address or missing out on important information.
- Using incompatible information systems to share personal data, resulting in the loss, corruption or degradation of the data.
- Having inappropriate security measures in place, leading to loss or unauthorised disclosure of personal details. For example, sending personal data between organisations on an unencrypted memory stick which is then lost or faxing sensitive personal data to a general office number.



ICO powers and penalties

The ICO aims to make compliance with the Data Protection Act (DPA) easier for the majority of organisations who want to handle personal data well. In cases where organisations do not comply the ICO has powers to take action to change behaviour. These powers include the ability to serve an enforcement notice, to conduct audits and to serve a monetary penalty notice. The tools are not mutually exclusive. They will be used in combination where justified by the circumstances.

The main options are:

- **Information notice:** this requires organisations to provide the ICO with specified information within a certain time period.
- **Undertaking:** this commits an organisation to a particular course of action in order to improve its compliance with the DPA.
- **Enforcement notice:** this compels an organisation to take the action specified in the notice to bring about compliance with the DPA. For example, a notice may be served to compel an organisation to start complying with subject access requests in the timescale required or a notice may require an organisation to take steps to prevent security breaches. Failure to comply with an enforcement notice can be a criminal offence.
- **Monetary penalty notice:** a monetary penalty notice requires an organisation to pay a monetary penalty of an amount determined by the ICO, up to a maximum of £500,000. This power can be used if:
 - an organisation has seriously contravened the data protection principles; and
 - the contravention was of a kind likely to cause substantial damage or substantial distress.

In addition the contravention must either have been deliberate or the organisation must have known, or ought to have known, that there was a risk that a contravention would occur and failed to take reasonable steps to prevent it.

More guidance on the circumstances in which the Information Commissioner will use this power, including what is considered a 'serious breach', can be found in our guidance: www.ico.gov.uk

- **Audit:** the ICO can conduct consensual or compulsory audits (following the serving of an Assessment Notice). A compulsory audit would be used by the ICO to determine whether an organisation has complied or is complying with the data protection principles where risks are identified and an organisation is unwilling to consent to an audit.

A consensual audit can assess an organisation's processing of personal data for the following of good practice. This includes a consideration of the legal requirements of the DPA and other relevant ICO codes and guidance. This will include the requirements of this code of practice.

The power to undertake compulsory audits currently only extends to government departments. However, other sectors may be designated by order of the Secretary of State.

The 'Assessment notices code of practice' sets out the factors which will be considered when the ICO decides whether to pursue a compulsory audit and specifies how that audit process will be conducted: www.ico.gov.uk

The ICO takes a selective, proportionate and risk based approach to pursuing regulatory action. Action is driven by concerns about actual or potential detriment caused by failure to comply with the DPA. The factors the ICO will take into account in determining whether regulatory action is appropriate are listed in the Data Protection Regulatory Action Policy: www.ico.gov.uk

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Notification

The Data Protection Act (DPA) requires that organisations provide the ICO with a description of the individuals or organisations to whom they intend or may wish to disclose personal data. The legal requirement is to provide a description of the recipient or the recipients of the data – this means types of organisation, not the names of specific organisations. The notification requirement does not include people to whom you may be required by law to disclose personal data in a particular case, for example where the police require a disclosure of personal data under a warrant.

When you intend to share personal data with another organisation or group of organisations you must check whether you need to update your notification to describe this. When any part of the notification entry becomes inaccurate or incomplete, for example because you are now disclosing information to a new type of organisation, you must inform the ICO as soon as practical and in any event within 28 days. It is a criminal offence not to do this.

Where several organisations are sharing personal data it is important that each organisation is clear about the personal data they are responsible for and include that information on their notification entry.

You can find out whether you need to notify under the DPA here: www.ico.gov.uk



Freedom of Information

The Freedom of Information Act 2000 (FOIA) gives everyone the right to ask for information held by a public authority and, unless exempt, to be told whether the information is held and to be provided with the information. In some cases, public authorities can refuse to confirm or deny whether they hold requested information. Advice on which organisations are public authorities under the Act can be found on our website at: www.ico.gov.uk

The INSPIRE Regulations contain provisions that deal specifically with the sharing of spatial data sets and spatial data services between public authorities. For more information about this see: www.legislation.gov.uk

The FOIA requires every public authority to adopt and maintain a publication scheme, which is a commitment to publish information on a proactive and routine basis. This supports the culture of transparency introduced by freedom of information legislation and allows the public to easily identify and access a wide range of information without having to make a request.

This section relates to the FOIA and does not apply to Scottish public authorities, which are subject to the Freedom of Information (Scotland) Act 2002 (FOISA). Further information on the freedom of information obligations of Scottish public authorities, including requirements with regard to publication schemes, can be found on the website of the Scottish Information Commissioner at: www.itspublicknowledge.info

Most, if not all, public sector bodies involved in data sharing are subject to freedom of information law. This means they are required to publish information in accordance with their publication scheme. The ICO introduced a model publication scheme that should be adopted by all public authorities subject to FOIA. The scheme became available for adoption on 1 January 2009. Further information on the scheme can be found on our website at: www.ico.gov.uk

Public authorities are required to publish information covered by the model scheme's seven classes, and in accordance with class 5 they are required to publish their policies and procedures. In most cases this will include the policies and procedures relating to data sharing, including the details of the organisations with which data is shared and any relevant code of practice. Further information on the types of information we expect public authorities to make available through their schemes is available on our website at: www.ico.gov.uk

There is a strong public interest in members of the public being able to find out easily why data is being shared, which organisations are involved and what standards and safeguards are in place. Making your policies and procedures available to the public proactively should help to reassure individuals and to establish an increased level of trust and confidence in your organisation's data sharing practices. You should consider including details of data sharing with other public authorities within the policies and procedures that you publish in accordance with your publication scheme.

There will often be cases where data is shared with other public authorities. This will usually mean that the data is held for the purposes of the FOIA by all the data sharing partners and an FOI request could be made to any of the public authorities that hold the information. However, within the FOIA there is an exemption for the personal data of third parties that falls within the scope of a request. In many cases this exemption will apply as disclosure is likely to be unfair and so be in breach of the first data protection principle.

Often people will make requests for information that cover both personal and non-personal data. For example, a person may request data about them that is being shared between various agencies and information about those agencies' policies for sharing information. Data protection and freedom of information may be dealt with by separate parts of your organisation, and a hybrid request may have to be dealt with under both pieces of legislation. However, it is good practice to be as helpful as possible when dealing with requests of this sort, especially as members of the public may not understand the difference between a data protection and an FOI request.

There may be circumstances where a private or third sector organisation shares data with a public authority. It is therefore important that, in such cases, individuals are made aware that information they provide will also be held by an organisation that is subject to the FOIA and so may fall within the scope of a request for information made to the public authority. However, as mentioned previously, there is an exemption within the FOIA for the personal data of third parties to which a request for information relates. In many cases this exemption will apply as disclosure is likely to be unfair and so be in breach of the principle that personal data must be processed fairly and lawfully.

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Data sharing agreements

Data sharing agreements can take a variety of forms, depending on the scale and complexity of the data sharing in question. You should remember that a data sharing agreement is a set of common rules binding on all the organisations involved in a data sharing initiative. This means that the agreement should be drafted in clear, concise language that is easily understood.

Drafting and adhering to an agreement does not in itself provide any form of legal indemnity from action under the Data Protection Act (DPA) or other law. However, an agreement should help you to justify your data sharing and to demonstrate that you have been mindful of, and have documented, the relevant compliance issues. The ICO will take this into account should it receive a complaint about your data sharing.

In order to adopt good practice and to comply with the DPA, the ICO would expect a data sharing agreement to address the following issues:

Purpose of the data sharing initiative:

Your agreement should explain why the data sharing initiative is necessary, the specific aims you have and the benefits you hope to bring to individuals or to society more widely. This should be documented in precise terms so that all parties are absolutely clear as to the purposes for which data may be shared and shared data may be used.

The organisations that will be involved in the data sharing:

Your agreement should identify clearly all the organisations that will be involved in the data sharing and should include contact details for their key members of staff. It should also contain procedures for including additional organisations in the data sharing arrangement and for dealing with cases where an organisation needs to be excluded from the sharing.

Data items to be shared:

Your agreement should explain the types of data that you are intending to share with the organisations stated above. This may need to be quite detailed, because in some cases it will be appropriate to share certain details held in a file about someone, but not other, more sensitive, material. In some cases it may be appropriate to attach 'permissions' to certain data items, so that only certain members of staff, for example ones that have received appropriate training, are allowed to access them.

Basis for sharing:

You need to explain your basis for sharing data clearly. If you are a public sector body, you may be under a legal duty to share certain types of personal data. Even if you are not under any legal requirement to share data, you should explain the legal power you have which allows you to share. If you are a private or third sector organisation then you may not need a specific legal power to disclose personal data, but your agreement should still explain how the disclosures will be consistent with the DPA.

If consent is to be a basis for disclosure then your agreement could provide a model consent form. It should also address issues surrounding the withholding or retraction of consent.

Access and individuals' rights:

The agreement should explain what to do when an organisation receives a DPA or FOIA request for access to shared data. In particular, it should ensure that one staff member or organisation takes overall responsibility for ensuring that the individual can gain access to all the shared data easily. Although decisions about access will often have to be taken on a case by case basis, your agreement should give a broad outline of the sorts of data you will normally release in response to either DPA or FOIA requests. It should also address the inclusion of certain types of information in your FOIA publication scheme.

Information governance:

Your agreement should also deal with the main practical problems that may arise when sharing personal data. This should ensure that all organisations involved in the sharing:

- have detailed advice about which datasets may be shared, to prevent irrelevant or excessive information being disclosed;
- make sure that the data being shared is accurate, for example by requiring a periodic sampling exercise;
- are using compatible datasets and are recording data in the same way. The agreement could include examples showing how particular data items – for example dates of birth – should be recorded;
- have common rules for the retention and deletion of shared data items and procedures for dealing with cases where different organisations may have different statutory or professional retention or deletion rules;
- have common technical and organisational security arrangements, including for the transmission of the data and procedures for dealing with any breach of the agreement;

- have procedures for dealing with DPA or FOIA access requests, or complaints or queries, from members of the public;
- have a timescale for assessing the ongoing effectiveness of the data sharing initiative and of the agreement that governs it; and
- have procedures for dealing with the termination of the data sharing initiative, including the deletion of shared data or its return to the organisation that supplied it originally.

It might be helpful for your agreement to have an appendix, including:

- a glossary of key terms;
- a summary of the key legislative provisions, for example relevant sections of the DPA, any legislation which provides your legal basis for data sharing and links to any authoritative professional guidance;
- a model form for seeking individuals' consent for data sharing; and
- a diagram to show how to decide whether to share data.

You may also want to consider including:

- a data sharing request form; and
- a data sharing decision form.

Template 'data sharing request' form

Name of organisation:	
Name and position of person requesting data:	
Date of request:	
Reference to data sharing agreement:	
Data requested:	
Purpose:	
Date required by:	
Any specific arrangements re: retention/deletion of data:	
Signed:	
Dated:	

Template ‘data sharing decision’ form

Name of organisation:	
Name and position of person requesting data:	
Date request received:	
Data requested:	
Purpose:	
Decision:	
Data supplied:	
Reason(s) for disclosure or non-disclosure:	
Any specific arrangements re: retention/deletion of data:	
Decision taken by (name and position):	
Date of disclosure:	
Signed:	
Dated:	

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Data sharing checklists

Data sharing checklist – systematic data sharing

Scenario: You want to enter into an agreement to share personal data on an ongoing basis

Is the sharing justified?

Key points to consider:

- What is the sharing meant to achieve?
- Have you assessed the potential benefits and risks to individuals and/or society of sharing or not sharing?
- Is the sharing proportionate to the issue you are addressing?
- Could the objective be achieved without sharing personal data?

Do you have the power to share?

Key points to consider:

- The type of organisation you work for.
- Any relevant functions or powers of your organisation.
- The nature of the information you have been asked to share (for example, was it given in confidence?).
- Any legal obligation to share information (for example a statutory requirement or a court order).

If you decide to share

It is good practice to have a data sharing agreement in place. As well as considering the key points above, your data sharing agreement should cover the following issues:

- What information needs to be shared.
- The organisations that will be involved.
- What you need to tell people about the data sharing and how you will communicate that information.
- Measures to ensure adequate security is in place to protect the data.
- What arrangements need to be in place to provide individuals with access to their personal data if they request it.
- Agreed common retention periods for the data.
- Processes to ensure secure deletion takes place.

Data sharing checklist – one off requests

Scenario: You are asked to share personal data relating to an individual in 'one off' circumstances

Is the sharing justified?

Key points to consider:

- Do you think you should share the information?
- Have you assessed the potential benefits and risks to individuals and/or society of sharing or not sharing?
- Do you have concerns that an individual is at risk of serious harm?
- Do you need to consider an exemption in the DPA to share?

Do you have the power to share?

Key points to consider:

- The type of organisation you work for.
- Any relevant functions or powers of your organisation.
- The nature of the information you have been asked to share (for example was it given in confidence?).
- Any legal obligation to share information (for example a statutory requirement or a court order).

If you decide to share

Key points to consider:

- What information do you need to share?
 - Only share what is necessary.
 - Distinguish fact from opinion.
- How should the information be shared?
 - Information must be shared securely.
 - Ensure you are giving information to the right person.
- Consider whether it is appropriate/safe to inform the individual that you have shared their information.

Record your decision

Record your data sharing decision and your reasoning – whether or not you shared the information.

If you share information you should record:

- What information was shared and for what purpose.
- Who it was shared with.
- When it was shared.
- Your justification for sharing.
- Whether the information was shared with or without consent.

Annex 1 – The data protection principles

- 1** "Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-(a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met".
- 2** "Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes".
- 3** "Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed".
- 4** "Personal data shall be accurate and, where necessary, kept up to date".
- 5** "Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes".
- 6** "Personal data shall be processed in accordance with the rights of data subjects under this Act".
- 7** "Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data".
- 8** "Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data".

Annex 2 – Glossary

Anonymised information – information from which no individual can be identified.

Assessment notice – this gives the Information Commissioner certain powers to assess compliance with the Data Protection Act.

Data controller – a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed.

Data processor – any person (other than an employee of the data controller) who processes the data on behalf of the data controller.

Data Protection Act 1998 (DPA) – the main UK legislation which governs the handling and protection of information relating to living people.

Data sharing – the disclosure of data from one or more organisations to a third party organisation or organisations, or the sharing of data between different parts of an organisation. Can take the form of systematic, routine data sharing where the same data sets are shared between the same organisations for an established purpose; and exceptional, one off decisions to share data for any of a range of purposes.

Data sharing agreements/protocols – set out a common set of rules to be adopted by the various organisations involved in a data sharing operation.

Interoperability – in relation to electronic systems or software, the ability to exchange and make use of information.

INSPIRE Regulations – Directive 2007/2/EC of the European Parliament and of the Council establishing an Infrastructure for Spatial Information in the European Community.

Notification – The Information Commissioner's Office maintains a public register of data controllers. Each register entry includes the name and address of the data controller and details about the types of personal data they process. Notification is the process by which a data controller's details are added to the register.

Personal data – data which relate to a living individual who can be identified—

- a** from those data, or
- b** from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

Privacy impact assessment (PIA) – is a comprehensive process for determining the privacy, confidentiality and security risks associated with the collection, use and disclosure of personal data.

Processing of data – in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—

- a** organisation, adaptation or alteration of the information or data,
- b** retrieval, consultation or use of the information or data,
- c** disclosure of the information or data by transmission, dissemination or otherwise making available, or
- d** alignment, combination, blocking, erasure or destruction of the information or data.

Public authority – as defined in section 3 of the Freedom of Information Act 2000.

Sensitive personal data – personal data consisting of information as to—

- a** the racial or ethnic origin of the data subject,
- b** his political opinions,
- c** his religious beliefs or other beliefs of a similar nature,
- d** whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- e** his physical or mental health or condition,
- f** his sexual life,
- g** the commission or alleged commission by him of any offence, or
- h** any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

Subject access request (SAR) – under the Data Protection Act, individuals can ask to see the information about themselves that is held on computer and in some paper records, by writing to the person or organisation they believe holds it. A subject access request must be made in writing (email is acceptable) and must be accompanied by the appropriate fee, usually up to a maximum of £10. Once the applicable fee has been paid, a reply must be received within 40 calendar days.

Third sector – non-governmental, not for profit organisations such as charities, voluntary and community organisations and social enterprises.

Annex 3 – Case studies

A group of retailers has set up a national database containing the details of former employees who were dismissed for stealing from their employer. This will allow employers participating in the scheme to vet job applicants as part of the recruitment process.

- Each participating retailer's privacy notice should explain, in general terms, that information about employees dismissed for theft will be included on the database.
- Given the significant effect the information on the database could have on their employment prospects, individuals should be told that their details have been included on it, using the most up to date details the retailer has.
- Individuals should be allowed to check that the information held about them is correct and either have it corrected or deleted, or have a note saying that they disagree with the information included on their record.

It would be the individual's prerogative to seek compensation if an employment prospect is denied them on the basis of inaccurate personal data.

A group of police forces are cooperating with immigration officials to collect evidence about a number of individuals thought to be involved in people trafficking. This involves exchanging data about suspects' whereabouts and activities.

- There is no need to tell any of the suspects that personal data about them is being collected or exchanged. This is because doing so would 'tip off' the suspects, allowing them to destroy evidence, prejudicing the likelihood of prosecution.
- The police, or immigration agency, may still need to provide subject access to the data, and explain their collection and sharing of the data, when doing so will no longer prejudice the prosecution.

A supermarket holds information about its customers, obtained through the operation of its 'loyalty' card scheme, from in-store CCTV and contained in records of payments. The company does not normally disclose any information to third parties, for example for marketing purposes. However, it will do so where the information held is relevant to a police investigation or in response to a court order, for example.

- Customers should have access to a privacy notice – either from the supermarket or the card scheme operator – that provides an explanation, in general terms, of the sorts of circumstances in which information about scheme members will be shared with a third party, such as the police.
- Where information about a particular scheme member has been disclosed, the supermarket does not need to inform the individual of the disclosure if this would prejudice crime prevention.

Two neighbouring health authorities want to share information about their employees because they have been informed that certain individuals are apparently being employed by both health authorities and are working the same shift pattern at each.

- The health authorities involved should make it clear to their staff that they are carrying out an anti-fraud operation of this sort. They should explain what data will be shared, who it will be shared with and why it is being shared.
- If possible, the health authorities should only share data about particular employees who are suspected of fraudulent behaviour.
- However, if data about all employees is to be matched, any discrepancies should be recorded and investigated, and data about all the other employees should be deleted or returned to the original health authority.

A mobile phone company intends to share details of customer accounts with a credit reference agency.

- Customers should be informed when they open the account that information will be shared with credit reference agencies.
- Credit reference agencies need to be able to link records to the correct individual. The mobile phone company should ensure it is collecting adequate information to distinguish between individuals, for example dates of birth.
- The organisations involved should have procedures in place to deal with complaints about the accuracy of the information they have shared.

A local university wants to conduct research into the academic performance of children from deprived family backgrounds in the local area. The university wants to identify the relevant children by finding out which ones are eligible for free school meals. Therefore, it wants to ask all local primary and secondary schools for this personal data, as well as the relevant children's test results for the past three years.

- The DPA contains various provisions that are intended to facilitate the processing of personal data for research purposes. However, there is no exemption from the general duty to process the data fairly. Data about families' income levels, or eligibility for benefit, can be inferred fairly reliably from a child's receipt of free school meals. Parents and their children may well object to the disclosure of this data because they consider it sensitive and potentially stigmatising. Data about a child's academic performance could be considered equally sensitive.
- The school could identify eligible children on the researchers' behalf and contact their parents, explaining what the research is about, what data the researchers want and seeking their consent for the sharing of the data.
- Alternatively, the school could disclose an anonymised data set, or statistical information, to the researchers.
- There is an exemption from subject access for data processed only for research purposes, provided certain conditions are satisfied, for example the research results are not made available in a form which identifies anyone. However, it is good practice to provide data subjects with access to their personal data wherever possible. If subject access is going to be refused, for example because giving access would prejudice the research results, this should be explained to individuals during the research enrolment process.

A marketing company (data controller) wants to share data with a 'fulfilment' company (data processor) so it can send out free samples and information about special offers to its customers. Before it supplies its customers' data to the fulfilment company the marketing company must:

- make sure the fulfilment house can guarantee sufficient technical and organisational security;
- put a contract in place saying what the fulfilment company can and cannot do with the personal data supplied to it, and imposing security requirements on it; and
- take reasonable steps to ensure sufficient security is being maintained.

A local authority's Recreation Department wants to promote take up of a new keep fit service for disabled people that it has launched at a local sports centre. The Authority's Revenue Department holds records of people who are eligible for reduced Council Tax on account of a disability. The Recreation Department wants a list of these people, so it can send them a leaflet promoting the new keep fit service.

- Many people will consider information about their health, particularly their disability, to be particularly sensitive. Therefore they might find it inappropriate for the Revenue Department to have shared their details with the Recreation Department.
- The sharing of data could be avoided if the Revenue Department sends out the promotional leaflet on behalf of the Recreation Department. However, some Council Tax payers might still find this inappropriate.
- Council Tax information is collected under statutory authority so the Revenue Department should seek legal advice before using the information for a non-Council Tax related purpose.

A council is outsourcing work previously carried out by its children and family services department to a charity. The charity will need details of the families currently receiving services to take over the council's role. The council writes to customers to tell them what is happening. As customers have no option but to deal with the new provider if they want to continue to receive their services, the council's letter should explain clearly who will be providing the service and what information will be passed over. It should reassure customers that information will continue to be used for the same purposes.

A local authority is required by law to participate in a nationwide anti-fraud exercise that involves disclosing personal data about its employees to an anti-fraud body. The exercise is intended to detect local authority employees who are illegally claiming benefits that they are not entitled to.

- Even though the sharing is required by law, the local authority should still inform any employees affected that data about them is going to be shared and should explain why this is taking place unless this would prejudice proceedings.
- The local authority should say what data items are going to be shared – names, addresses and National Insurance numbers – and provide the identity of the organisation they will be shared with.
- There is no point in the local authority seeking employees' consent for the sharing because the law says the sharing can take place without consent. The local authority should also be clear with its employees that even if they object to the sharing, it will still take place.
- The local authority should be prepared to investigate complaints from employees who believe they have been treated unfairly because, for example, their records have been mixed up with those of an employee with the same name.

If you would like to contact us please call 0303 123 1113

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Potential Extremists May Be Working In Dublin Offices According To MI6 Lovin Dublin

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Data protection



Introduction

The legal definition of personal data is very broad. Any information relating to an identified or identifiable person is considered personal data (for a full definition see Article 2 paragraph a) of Regulation (EC) No 45/2001).

Examples of personal data are telephone numbers, addresses, financial information, photographs, satellite images, car registrations, ID numbers, e-mail addresses, health records, etc.

Personal data can be contained in computer files (e.g. in databases, on the Internet or other closed networks) or in paper records. Data protection is a fundamental right, protected not only by national legislation, but also by European law.

Legal basis

The legal basis for data protection is Regulation (EC) No 45/2001.

This regulation aims to protect the liberties and fundamental rights of individuals and in particular their right to privacy with respect to the processing of personal data about them.

It only applies within the institutions and bodies set up by, or on the basis of, the Treaties establishing the European Communities. The legal basis for data protection concerning the general public is not ruled by this Regulation.

The Regulation applies to the processing of personal data by all Community institutions and bodies, insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law (Article 3.2.)

Legal background

1. Charter of Fundamental Rights of the EU - Article 8
2. Treaty establishing the European Community - Article 286

Collection of personal data by the FRA

A number of the FRA's activities involve the collection and processing of personal data, for example as part of recruitment, or collecting data for salaries or reimbursements, contractual arrangements with suppliers or organization of events, etc.

Such collecting and processing of personal data and its subsequent utilization should be done "fairly and lawfully" (Article 4 paragraph 1a).

Purpose of the collection

Whenever personal data is requested, it is essential that the data subject (the person whose personal data are collected, held or processed) knows for what purposes the data is being collected. According to Article 4 Paragraph a) of the Regulation, personal data "must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes."

Moreover, personal data must be adequate, relevant, and not excessive in relation to the purpose and kept for no longer than is necessary for the purposes for which they were collected.

Rights of data subjects

When personal data are requested, data subjects have the right

See also:

[Regulation \(EC\) No 45/2001](#)

- to be informed of the processing operations (Articles 11 and 12)
- to access, rectify, block or erase the data (Articles 13-16)
- to object to the processing on compelling legitimate grounds (Article 18)
- to compensation for any damage (Article 32)


Other principles

1. Processing of personal data is only lawful, if the purpose(s) is legitimate and if it is necessary either:
 - for the performance of a task carried out in the public interest or in the legitimate exercise of official authority (Article 5(a))
 - for compliance with a legal obligation (Article 5(b))
 - for the performance of a contract to which the data subject is party (Article 5(c))
 - if the data subject has unambiguously given his or her consent (Article 5(d))
 - in order to protect the vital interests of the data subject (Article 5(e)).
2. The Data Controller (i.e. the person who is responsible for the processing operation) must ensure that all provisions of the Regulation (EC) 45/2001 are complied with.
3. According to the principles of confidentiality and security, only those people who need access shall have it. By analogy:
 - access to basic personal data shall be limited to staff who need it for their work (such as security guards).
 - access to a staff evaluation report should be limited to the particular employee in question, as well as to a restricted number of people in the human resources department.
4. Sensitive data, such as medical files or an arrest warrant, shall be treated even more carefully (Article 10.3).
5. Personal data should in general be transferred neither internally nor externally, unless it is necessary for the legitimate performance of tasks covered by the competence of the recipient – the necessity of the transfer must be evaluated. In certain cases data subjects must be informed of the transfer.
6. Unauthorized access to personal data should be prevented by ensuring appropriate safeguards, both:
 - in terms of barriers that secure the system technically and logistically
 - by selecting a limited and appropriate number of people who have authorized access

The main players

Besides the data subject, there are three main data protection players:

The [European Data Protection Supervisor](#) (EDPS) is responsible for the monitoring of Community institutions and bodies on their compliance with data protection rules, in particular to ensure that the fundamental rights and freedoms of natural persons, especially their right to privacy, are respected by the Community institutions and bodies. The EDPS is an independent supervisory authority.

The **Data Protection Officer** (DPO) ensures that data controllers and individuals know their rights and obligations, co-operates with the EDPS, ensures internal application of the regulations and keeps a register of processing operations notified by the controllers. The FRA has one designated DPO, who can be contacted via e-mail at: dpo@fra.europa.eu 


The EDPS has presented his view on the role of the DPOs in a [position paper](#).

This paper aims at examining the key role of DPOs and the underlying synergies between the DPOs and the EDPS in ensuring effective compliance with data protection principles. It also provides guidelines on the type of profile required by a DPO and the resources that need to be allocated to the DPO so as to ensure the good performance of his/her duties.

The **Data Controller** is the person who determines how personal data is processed, and is the person that grants the rights to the data subject. For each processing operation, a Data Controller must be identified and prior notice must be given to the DPO of the institution.

Who should you contact for more information about the processing of your personal data by the Agency?

If you feel that your personal data are being misused by the Agency, or their processing by the Agency is otherwise not compliant with Regulation (EC) No 45/2001, you should first notify the Data Controller for the processing in question and ask him or her to take action.


You may also contact the Agency's DPO at dpo@fra.europa.eu  to inform him or her of any issues related to the processing of your data.

If the problem cannot be solved this way, you may lodge a complaint with the EDPS. The EDPS is empowered to hear and investigate complaints and to conduct inquiries, including on his or her own initiative. If a breach of data protection rules is found to have occurred, the EDPS may exercise the powers assigned to him under Article 47 of Regulation (EC) No 45/2001.

Please see below for a list of documents relating to the processing of personal data.

Downloads:

Protection of personal data in relation to the organisation of events

 [en](#) (133.28 KB)

Protection of personal data in relation to procurement procedures and contract management

 [en](#) (93.5 KB)


Protection of personal data in relation to the processing of individual complaints

 [en](#) (26.62 KB)


Protection of personal data in relation to applications to participate in the Fundamental Rights Platform

 [en](#) (94.28 KB)


Protection of personal data of experts invited by FRA to participate in meetings

 [en](#) (30.13 KB)

Privacy statement in relation to recruitment

 [en](#) (15.62 KB)

Video Surveillance Policy

 [en](#) (171.53 KB)


Information Note for data subjects requesting access to documents

 [en](#) (344.57 KB)


Privacy Statement - Internship

 [en](#) (151.65 KB)

Information Note: Handling of contact data stored in the Agency contact database

 [en](#) (124.1 KB)


Privacy Statement - Health data

 [en](#) (36.48 KB)


Information note to data subjects - Network of Heads of Communication and Information activities

 [en](#) (34.08 KB)

Information note - EU agencies and institutions feedback on surveys related to the activities of the network

 [en](#) (135.05 KB)

Information note to data subjects - Collection of experiences and views of member associations of the European Legal Interpreters and Translators Association

 [en](#) (119.47 KB)

Information note - Consultation on the Multi Annual framework 2018-2022

 [en](#) (246.57 KB)

Information note - FRA consultations with the FRP

 [en](#) (227.32 KB)

Information note for data subjects - Fundamental Rights Platform registration

 [en](#) (224.76 KB)

Information note to data subjects - Evaluation of monthly overview reports on migration and asylum situation in the EU

 [en](#) (210.22 KB)

Information note to data subjects - Consultation on the Fundamental Rights Forum

 [en](#) (375.75 KB)

Information Notice - Right to independent living online questionnaire

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Information Notice for Data Subjects - Evaluation of surveillance report

 [en](#) (120.89 KB)

Privacy Notice - Building access data

 [en](#) (76.84 KB)

Privacy notice to data subjects - Clarity tool

 [en](#) (133.15 KB)

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Title and reference

Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA


 In force

OJ L 119, 4.5.2016, p. 89–131 (BG, ES, CS, DA, DE, ET, EL, EN, FR, HR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV)

ELI: <http://data.europa.eu/eli/dir/2016/680/oj>

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DIRECTIVE (EU) 2016/680 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016

on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,


Having regard to the opinion of the Committee of the Regions⁽¹⁾,

Acting in accordance with the ordinary legislative procedure⁽²⁾,

Whereas:

(1) The protection of natural persons in relation to the processing of personal data is a fundamental right. Article 8(1) of the Charter of Fundamental Rights of the European Union ("the Charter") and Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) provide that everyone has the right to the protection of personal data concerning him or her.

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concerning him or her.

- (2) The principles of, and rules on the protection of natural persons with regard to the processing of their personal data should, whatever their nationality or residence, respect their fundamental rights and freedoms, in particular their right to the protection of personal data. This Directive is intended to contribute to the accomplishment of an area of freedom, security and justice.
- (3) Rapid technological developments and globalisation have brought new challenges for the protection of personal data. The scale of the collection and sharing of personal data has increased significantly. Technology allows personal data to be processed on an unprecedented scale in order to pursue activities such as the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties.
- (4) The free flow of personal data between competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security within the Union and the transfer of such personal data to third countries and international organisations, should be facilitated while ensuring a high level of protection of personal data. Those developments require the building of a strong and more coherent framework for the protection of personal data in the Union, backed by strong enforcement.
- (5) Directive 95/46/EC of the European Parliament and of the Council⁽³⁾ applies to all processing of personal data in Member States in both the public and the private sectors. However, it does not apply to the processing of personal data in the course of an activity which falls outside the scope of Community law, such as activities in the areas of judicial cooperation in criminal matters and police cooperation.
- (6) Council Framework Decision 2008/977/JHA⁽⁴⁾ applies in the areas of judicial cooperation in criminal matters and police cooperation. The scope of application of that Framework Decision is limited to the processing of personal data transmitted or made available between Member States.
- (7) Ensuring a consistent and high level of protection of the personal data of natural persons and facilitating the exchange of personal data between competent authorities of Member States is crucial in order to ensure effective judicial cooperation in criminal matters and police cooperation. To that end, the level of protection of the rights and freedoms of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, should be equivalent in all Member States. Effective protection of personal data throughout the Union requires the strengthening of the rights of data subjects and of the obligations of those who process personal data, as well as equivalent powers for monitoring and ensuring compliance with the rules for the protection of personal data in the Member States.
- (8) Article 16(2) TFEU mandates the European Parliament and the Council to lay down the rules relating to the protection of natural persons with regard to the processing of personal data and the rules relating to the free movement of personal data.
- (9) On that basis, Regulation (EU) 2016/679 of the European Parliament and of the Council⁽⁵⁾ lays down general rules to protect natural persons in relation to the processing of personal data and to ensure the free movement of personal data within the Union.
- (10) In Declaration No 21 on the protection of personal data in the fields of judicial cooperation in criminal matters and police cooperation, annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon, the conference acknowledged that specific rules on the protection of personal data and the free movement of personal data in the fields of judicial cooperation in criminal matters and police cooperation based on Article 16 TFEU may prove necessary because of the specific nature of those fields.
- (11) It is therefore appropriate for those fields to be addressed by a directive that lays down the specific rules relating to the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, respecting the specific nature of those activities. Such competent authorities may include not only public authorities such as the judicial authorities, the police or other law-enforcement authorities but also any other body or entity entrusted by Member State law to exercise public authority and public powers for the purposes of this Directive. Where such a body or entity processes personal data for purposes other than for the purposes of this Directive, Regulation (EU) 2016/679 applies. Regulation (EU) 2016/679

therefore applies in cases where a body or entity collects personal data for other purposes and further processes those personal data in order to comply with a legal obligation to which it is subject. For example, for the purposes of investigation detection or prosecution of criminal offences financial institutions retain certain personal data which are processed by them, and provide those personal data only to the competent national authorities in specific cases and in accordance with Member State law. A body or entity which processes personal data on behalf of such authorities within the scope of this Directive should be bound by a contract or other legal act and by the provisions applicable to processors pursuant to this Directive, while the application of Regulation (EU) 2016/679 remains unaffected for the processing of personal data by the processor outside the scope of this Directive.

- (12) The activities carried out by the police or other law-enforcement authorities are focused mainly on the prevention, investigation, detection or prosecution of criminal offences, including police activities without prior knowledge if an incident is a criminal offence or not. Such activities can also include the exercise of authority by taking coercive measures such as police activities at demonstrations, major sporting events and riots. They also include maintaining law and order as a task conferred on the police or other law-enforcement authorities where necessary to safeguard against and prevent threats to public security and to fundamental interests of the society protected by law which may lead to a criminal offence. Member States may entrust competent authorities with other tasks which are not necessarily carried out for the purposes of the prevention, investigation, detection or prosecution of criminal offences, including the safeguarding against and the prevention of threats to public security, so that the processing of personal data for those other purposes, in so far as it is within the scope of Union law, falls within the scope of Regulation (EU) 2016/679.
- (13) A criminal offence within the meaning of this Directive should be an autonomous concept of Union law as interpreted by the Court of Justice of the European Union (the 'Court of Justice').
- (14) Since this Directive should not apply to the processing of personal data in the course of an activity which falls outside the scope of Union law, activities concerning national security, activities of agencies or units dealing with national security issues and the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 2 of Title V of the Treaty on European Union (TEU) should not be considered to be activities falling within the scope of this Directive.
- (15) In order to ensure the same level of protection for natural persons through legally enforceable rights throughout the Union and to prevent divergences hampering the exchange of personal data between competent authorities, this Directive should provide for harmonised rules for the protection and the free movement of personal data processed for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security. The approximation of Member States' laws should not result in any lessening of the personal data protection they afford but should, on the contrary, seek to ensure a high level of protection within the Union. Member States should not be precluded from providing higher safeguards than those established in this Directive for the protection of the rights and freedoms of the data subject with regard to the processing of personal data by competent authorities.
- (16) This Directive is without prejudice to the principle of public access to official documents. Under Regulation (EU) 2016/679 personal data in official documents held by a public authority or a public or private body for the performance of a task carried out in the public interest may be disclosed by that authority or body in accordance with Union or Member State law to which the public authority or body is subject in order to reconcile public access to official documents with the right to the protection of personal data.
- (17) The protection afforded by this Directive should apply to natural persons, whatever their nationality or place of residence, in relation to the processing of their personal data.
- (18) In order to prevent creating a serious risk of circumvention, the protection of natural persons should be technologically neutral and should not depend on the techniques used. The protection of natural persons should apply to the processing of personal data by automated means, as well as to manual processing, if the personal data are contained or are intended to be contained in a filing system. Files or sets of files, as well as their cover pages, which are not structured according to specific criteria should not fall within the scope of this Directive.
- (19) Regulation (EC) No 45/2001 of the European Parliament and of the Council⁽⁶⁾ applies to the processing of personal data by the Union institutions, bodies, offices and agencies. Regulation (EC) No 45/2001 and other Union legal acts applicable to such processing of personal data should be adapted to the principles and rules established in

- (20) This Directive does not preclude Member States from specifying processing operations and processing procedures in national rules on criminal procedures in relation to the processing of personal data by courts and other judicial authorities, in particular as regards personal data contained in a judicial decision or in records in relation to criminal proceedings.
- (21) The principles of data protection should apply to any information concerning an identified or identifiable natural person. To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments. The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is no longer identifiable.
- (22) Public authorities to which personal data are disclosed in accordance with a legal obligation for the exercise of their official mission, such as tax and customs authorities, financial investigation units, independent administrative authorities, or financial market authorities responsible for the regulation and supervision of securities markets should not be regarded as recipients if they receive personal data which are necessary to carry out a particular inquiry in the general interest, in accordance with Union or Member State law. The requests for disclosure sent by the public authorities should always be in writing, reasoned and occasional and should not concern the entirety of a filing system or lead to the interconnection of filing systems. The processing of personal data by those public authorities should comply with the applicable data protection rules according to the purposes of the processing.
- (23) Genetic data should be defined as personal data relating to the inherited or acquired genetic characteristics of a natural person which give unique information about the physiology or health of that natural person and which result from the analysis of a biological sample from the natural person in question, in particular chromosomal, deoxyribonucleic acid (DNA) or ribonucleic acid (RNA) analysis, or from the analysis of another element enabling equivalent information to be obtained. Considering the complexity and sensitivity of genetic information, there is a great risk of misuse and re-use for various purposes by the controller. Any discrimination based on genetic features should in principle be prohibited.
- (24) Personal data concerning health should include all data pertaining to the health status of a data subject which reveal information relating to the past, current or future physical or mental health status of the data subject. This includes information about the natural person collected in the course of the registration for, or the provision of, health care services as referred to in Directive 2011/24/EU of the European Parliament and of the Council ⁽⁷⁾ to that natural person; a number, symbol or particular assigned to a natural person to uniquely identify the natural person for health purposes; information derived from the testing or examination of a body part or bodily substance, including from genetic data and biological samples; and any information on, for example, a disease, disability, disease risk, medical history, clinical treatment or the physiological or biomedical state of the data subject independent of its source, for example from a physician or other health professional, a hospital, a medical device or an in vitro diagnostic test.
- (25) All Member States are affiliated to the International Criminal Police Organisation (Interpol). To fulfil its mission, Interpol receives, stores and circulates personal data to assist competent authorities in preventing and combating international crime. It is therefore appropriate to strengthen cooperation between the Union and Interpol by promoting an efficient exchange of personal data whilst ensuring respect for fundamental rights and freedoms regarding the automatic processing of personal data. Where personal data are transferred from the Union to Interpol, and to countries which have delegated members to Interpol, this Directive, in particular the provisions on international transfers, should apply. This Directive should be without prejudice to the specific rules laid down in Council Common Position 2005/69/JHA ⁽⁸⁾ and Council Decision 2007/533/JHA ⁽⁹⁾.
- (26) Any processing of personal data must be lawful, fair and transparent in relation to the natural persons concerned, and only processed for specific purposes laid down by law. This does not in itself prevent the law-enforcement authorities from carrying out activities

such as covert investigations or video surveillance. Such activities can be done for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, as long as they are laid down by law and constitute a necessary and proportionate measure in a democratic society with due regard for the legitimate interests of the natural person concerned. The data protection principle of fair processing is a distinct notion from the right to a fair trial as defined in Article 47 of the Charter and in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Natural persons should be made aware of risks, rules, safeguards and rights in relation to the processing of their personal data and how to exercise their rights in relation to the processing. In particular, the specific purposes for which the personal data are processed should be explicit and legitimate and determined at the time of the collection of the personal data. The personal data should be adequate and relevant for the purposes for which they are processed. It should, in particular, be ensured that the personal data collected are not excessive and not kept longer than is necessary for the purpose for which they are processed. Personal data should be processed only if the purpose of the processing could not reasonably be fulfilled by other means. In order to ensure that the data are not kept longer than necessary, time limits should be established by the controller for erasure or for a periodic review. Member States should lay down appropriate safeguards for personal data stored for longer periods for archiving in the public interest, scientific, statistical or historical use.

- (27) For the prevention, investigation and prosecution of criminal offences, it is necessary for competent authorities to process personal data collected in the context of the prevention, investigation, detection or prosecution of specific criminal offences beyond that context in order to develop an understanding of criminal activities and to make links between different criminal offences detected.
- (28) In order to maintain security in relation to processing and to prevent processing in infringement of this Directive, personal data should be processed in a manner that ensures an appropriate level of security and confidentiality, including by preventing unauthorised access to or use of personal data and the equipment used for the processing, and that takes into account available state of the art and technology, the costs of implementation in relation to the risks and the nature of the personal data to be protected.
- (29) Personal data should be collected for specified, explicit and legitimate purposes within the scope of this Directive and should not be processed for purposes incompatible with the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security. If personal data are processed by the same or another controller for a purpose within the scope of this Directive other than that for which it has been collected, such processing should be permitted under the condition that such processing is authorised in accordance with applicable legal provisions and is necessary for and proportionate to that other purpose.
- (30) The principle of accuracy of data should be applied while taking account of the nature and purpose of the processing concerned. In particular in judicial proceedings, statements containing personal data are based on the subjective perception of natural persons and are not always verifiable. Consequently, the requirement of accuracy should not appertain to the accuracy of a statement but merely to the fact that a specific statement has been made.
- (31) It is inherent to the processing of personal data in the areas of judicial cooperation in criminal matters and police cooperation that personal data relating to different categories of data subjects are processed. Therefore, a clear distinction should, where applicable and as far as possible, be made between personal data of different categories of data subjects such as: suspects; persons convicted of a criminal offence; victims and other parties, such as witnesses; persons possessing relevant information or contacts; and associates of suspects and convicted criminals. This should not prevent the application of the right of presumption of innocence as guaranteed by the Charter and by the ECHR, as interpreted in the case-law of the Court of Justice and by the European Court of Human Rights respectively.
- (32) The competent authorities should ensure that personal data which are inaccurate, incomplete or no longer up to date are not transmitted or made available. In order to ensure the protection of natural persons, the accuracy, completeness or the extent to which the personal data are up to date and the reliability of the personal data transmitted or made available, the competent authorities should, as far as possible, add necessary information in all transmissions of personal data.
- (33) Where this Directive refers to Member State law, a legal basis or a legislative measure, this does not necessarily require a legislative act adopted by a parliament without

this does not necessarily require a legislative act adopted by a parliament, without prejudice to requirements pursuant to the constitutional order of the Member State concerned. However, such a Member State law, legal basis or legislative measure should be clear and precise and its application foreseeable for those subject to it, as required by the case-law of the Court of Justice and the European Court of Human Rights. Member State law regulating the processing of personal data within the scope of this Directive should specify at least the objectives, the personal data to be processed, the purposes of the processing and procedures for preserving the integrity and confidentiality of personal data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness.

- (34) The processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, should cover any operation or set of operations which are performed upon personal data or sets of personal data for those purposes, whether by automated means or otherwise, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, alignment or combination, restriction of processing, erasure or destruction. In particular, the rules of this Directive should apply to the transmission of personal data for the purposes of this Directive to a recipient not subject to this Directive. Such a recipient should encompass a natural or legal person, public authority, agency or any other body to which personal data are lawfully disclosed by the competent authority. Where personal data were initially collected by a competent authority for one of the purposes of this Directive, Regulation (EU) 2016/679 should apply to the processing of those data for purposes other than the purposes of this Directive where such processing is authorised by Union or Member State law. In particular, the rules of Regulation (EU) 2016/679 should apply to the transmission of personal data for purposes outside the scope of this Directive. For the processing of personal data by a recipient that is not a competent authority or that is not acting as such within the meaning of this Directive and to which personal data are lawfully disclosed by a competent authority, Regulation (EU) 2016/679 should apply. While implementing this Directive, Member States should also be able to further specify the application of the rules of Regulation (EU) 2016/679, subject to the conditions set out therein.
- (35) In order to be lawful, the processing of personal data under this Directive should be necessary for the performance of a task carried out in the public interest by a competent authority based on Union or Member State law for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security. Those activities should cover the protection of vital interests of the data subject. The performance of the tasks of preventing, investigating, detecting or prosecuting criminal offences institutionally conferred by law to the competent authorities allows them to require or order natural persons to comply with requests made. In such a case, the consent of the data subject, as defined in Regulation (EU) 2016/679, should not provide a legal ground for processing personal data by competent authorities. Where the data subject is required to comply with a legal obligation, the data subject has no genuine and free choice, so that the reaction of the data subject could not be considered to be a freely given indication of his or her wishes. This should not preclude Member States from providing, by law, that the data subject may agree to the processing of his or her personal data for the purposes of this Directive, such as DNA tests in criminal investigations or the monitoring of his or her location with electronic tags for the execution of criminal penalties.
- (36) Member States should provide that where Union or Member State law applicable to the transmitting competent authority provides for specific conditions applicable in specific circumstances to the processing of personal data, such as the use of handling codes, the transmitting competent authority should inform the recipient of such personal data of those conditions and the requirement to respect them. Such conditions could, for example, include a prohibition against transmitting the personal data further to others, or using them for purposes other than those for which they were transmitted to the recipient, or informing the data subject in the case of a limitation of the right of information without the prior approval of the transmitting competent authority. Those obligations should also apply to transfers by the transmitting competent authority to recipients in third countries or international organisations. Member States should ensure that the transmitting competent authority does not apply such conditions to recipients in other Member States or to agencies, offices and bodies established pursuant to Chapters 4 and 5 of Title V of the TFEU other than those applicable to similar data transmissions within the Member State of that competent authority.
- (37) Personal data which are, by their nature, particularly sensitive in relation to fundamental rights and freedoms merit specific protection as the context of their processing could create significant risks to the fundamental rights and freedoms. Those personal data should include personal data revealing racial or ethnic origin, whereby the use of the term 'racial origin' in this Directive does not imply an acceptance by the Union of theories

term racial origin in this Directive does not imply an acceptance by the Union of theories which attempt to determine the existence of separate human races. Such personal data should not be processed, unless processing is subject to appropriate safeguards for the rights and freedoms of the data subject laid down by law and is allowed in cases authorised by law; where not already authorised by such a law, the processing is necessary to protect the vital interests of the data subject or of another person; or the processing relates to data which are manifestly made public by the data subject. Appropriate safeguards for the rights and freedoms of the data subject could include the possibility to collect those data only in connection with other data on the natural person concerned, the possibility to secure the data collected adequately, stricter rules on the access of staff of the competent authority to the data and the prohibition of transmission of those data. The processing of such data should also be allowed by law where the data subject has explicitly agreed to the processing that is particularly intrusive to him or her. However, the consent of the data subject should not provide in itself a legal ground for processing such sensitive personal data by competent authorities.

- (38) The data subject should have the right not to be subject to a decision evaluating personal aspects relating to him or her which is based solely on automated processing and which produces adverse legal effects concerning, or significantly affects, him or her. In any case, such processing should be subject to suitable safeguards, including the provision of specific information to the data subject and the right to obtain human intervention, in particular to express his or her point of view, to obtain an explanation of the decision reached after such assessment or to challenge the decision. Profiling that results in discrimination against natural persons on the basis of personal data which are by their nature particularly sensitive in relation to fundamental rights and freedoms should be prohibited under the conditions laid down in Articles 21 and 52 of the Charter.
- (39) In order to enable him or her to exercise his or her rights, any information to the data subject should be easily accessible, including on the website of the controller, and easy to understand, using clear and plain language. Such information should be adapted to the needs of vulnerable persons such as children.
- (40) Modalities should be provided for facilitating the exercise of the data subject's rights under the provisions adopted pursuant to this Directive, including mechanisms to request and, if applicable, obtain, free of charge, in particular, access to and rectification or erasure of personal data and restriction of processing. The controller should be obliged to respond to requests of the data subject without undue delay, unless the controller applies limitations to data subject rights in accordance with this Directive. Moreover, if requests are manifestly unfounded or excessive, such as where the data subject unreasonably and repetitiously requests information or where the data subject abuses his or her right to receive information, for example, by providing false or misleading information when making the request, the controller should be able to charge a reasonable fee or refuse to act on the request.
- (41) Where the controller requests the provision of additional information necessary to confirm the identity of the data subject, that information should be processed only for that specific purpose and should not be stored for longer than needed for that purpose.
- (42) At least the following information should be made available to the data subject: the identity of the controller, the existence of the processing operation, the purposes of the processing, the right to lodge a complaint and the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing. This could take place on the website of the competent authority. In addition, in specific cases and in order to enable the exercise of his or her rights, the data subject should be informed of the legal basis for the processing and of how long the data will be stored, in so far as such further information is necessary, taking into account the specific circumstances in which the data are processed, to guarantee fair processing in respect of the data subject.
- (43) A natural person should have the right of access to data which has been collected concerning him or her, and to exercise this right easily and at reasonable intervals, in order to be aware of and verify the lawfulness of the processing. Every data subject should therefore have the right to know, and obtain communications about, the purposes for which the data are processed, the period during which the data are processed and the recipients of the data, including those in third countries. Where such communications include information as to the origin of the personal data, the information should not reveal the identity of natural persons, in particular confidential sources. For that right to be complied with, it is sufficient that the data subject be in possession of a full summary of those data in an intelligible form, that is to say a form which allows that data subject to become aware of those data and to verify that they are accurate and processed in accordance with this Directive, so that it is possible for him or her to exercise the rights conferred on him or her by this Directive. Such a summary could be provided in the form of a copy of the personal data undergoing processing.

- (44) Member States should be able to adopt legislative measures delaying, restricting or omitting the information to data subjects or restricting, wholly or partly, the access to their personal data to the extent that and as long as such a measure constitutes a necessary and proportionate measure in a democratic society with due regard for the fundamental rights and the legitimate interests of the natural person concerned, to avoid obstructing official or legal inquiries, investigations or procedures, to avoid prejudicing the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, to protect public security or national security, or to protect the rights and freedoms of others. The controller should assess, by way of a concrete and individual examination of each case, whether the right of access should be partially or completely restricted.
- (45) Any refusal or restriction of access should in principle be set out in writing to the data subject and include the factual or legal reasons on which the decision is based.
- (46) Any restriction of the rights of the data subject must comply with the Charter and with the ECHR, as interpreted in the case-law of the Court of Justice and by the European Court of Human Rights respectively, and in particular respect the essence of those rights and freedoms.
- (47) A natural person should have the right to have inaccurate personal data concerning him or her rectified, in particular where it relates to facts, and the right to erasure where the processing of such data infringes this Directive. However, the right to rectification should not affect, for example, the content of a witness testimony. A natural person should also have the right to restriction of processing where he or she contests the accuracy of personal data and its accuracy or inaccuracy cannot be ascertained or where the personal data have to be maintained for purpose of evidence. In particular, instead of erasing personal data, processing should be restricted if in a specific case there are reasonable grounds to believe that erasure could affect the legitimate interests of the data subject. In such a case, restricted data should be processed only for the purpose which prevented their erasure. Methods to restrict the processing of personal data could include, inter alia, moving the selected data to another processing system, for example for archiving purposes, or making the selected data unavailable. In automated filing systems the restriction of processing should in principle be ensured by technical means. The fact that the processing of personal data is restricted should be indicated in the system in such a manner that it is clear that the processing of the personal data is restricted. Such rectification or erasure of personal data or restriction of processing should be communicated to recipients to whom the data have been disclosed and to the competent authorities from which the inaccurate data originated. The controllers should also abstain from further dissemination of such data.
- (48) Where the controller denies a data subject his or her right to information, access to or rectification or erasure of personal data or restriction of processing, the data subject should have the right to request that the national supervisory authority verify the lawfulness of the processing. The data subject should be informed of that right. Where the supervisory authority acts on behalf of the data subject, the data subject should be informed by the supervisory authority at least that all necessary verifications or reviews by the supervisory authority have taken place. The supervisory authority should also inform the data subject of the right to seek a judicial remedy.
- (49) Where the personal data are processed in the course of a criminal investigation and court proceedings in criminal matters, Member States should be able to provide that the exercise the right to information, access to and rectification or erasure of personal data and restriction of processing is carried out in accordance with national rules on judicial proceedings.
- (50) The responsibility and liability of the controller for any processing of personal data carried out by the controller or on the controller's behalf should be established. In particular, the controller should be obliged to implement appropriate and effective measures and should be able to demonstrate that processing activities are in compliance with this Directive. Such measures should take into account the nature, scope, context and purposes of the processing and the risk to the rights and freedoms of natural persons. The measures taken by the controller should include drawing up and implementing specific safeguards in respect of the treatment of personal data of vulnerable natural persons, such as children.
- (51) The risk to the rights and freedoms of natural persons, of varying likelihood and severity, may result from data processing which could lead to physical, material or non-material damage, in particular: where the processing may give rise to discrimination, identity theft or fraud, financial loss, damage to the reputation, loss of confidentiality of data protected by professional secrecy, unauthorised reversal of pseudonymisation or any other significant economic or social disadvantage; where data subjects might be deprived of their rights and freedoms or from exercising control over their personal data: where

personal data are processed which reveal racial or ethnic origin, political opinions, religion or philosophical beliefs or trade union membership; where genetic data or biometric data are processed in order to uniquely identify a person or where data concerning health or data concerning sex life and sexual orientation or criminal convictions and offences or related security measures are processed; where personal aspects are evaluated, in particular analysing and predicting aspects concerning performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements, in order to create or use personal profiles; where personal data of vulnerable natural persons, in particular children, are processed; or where processing involves a large amount of personal data and affects a large number of data subjects.

- (52) The likelihood and severity of the risk should be determined by reference to the nature, scope, context and purposes of the processing. Risk should be evaluated on the basis of an objective assessment, through which it is established whether data-processing operations involve a high risk. A high risk is a particular risk of prejudice to the rights and freedoms of data subjects.
- (53) The protection of the rights and freedoms of natural persons with regard to the processing of personal data requires that appropriate technical and organisational measures are taken, to ensure that the requirements of this Directive are met. The implementation of such measures should not depend solely on economic considerations. In order to be able to demonstrate compliance with this Directive, the controller should adopt internal policies and implement measures which adhere in particular to the principles of data protection by design and data protection by default. Where the controller has carried out a data protection impact assessment pursuant to this Directive, the results should be taken into account when developing those measures and procedures. The measures could consist, inter alia, of the use of pseudonymisation, as early as possible. The use of pseudonymisation for the purposes of this Directive can serve as a tool that could facilitate, in particular, the free flow of personal data within the area of freedom, security and justice.
- (54) The protection of the rights and freedoms of data subjects as well as the responsibility and liability of controllers and processors, also in relation to the monitoring by and measures of supervisory authorities, requires a clear attribution of the responsibilities set out in this Directive, including where a controller determines the purposes and means of the processing jointly with other controllers or where a processing operation is carried out on behalf of a controller.
- (55) The carrying-out of processing by a processor should be governed by a legal act including a contract binding the processor to the controller and stipulating, in particular, that the processor should act only on instructions from the controller. The processor should take into account the principle of data protection by design and by default.
- (56) In order to demonstrate compliance with this Directive, the controller or processor should maintain records regarding all categories of processing activities under its responsibility. Each controller and processor should be obliged to cooperate with the supervisory authority and make those records available to it on request, so that they might serve for monitoring those processing operations. The controller or the processor processing personal data in non-automated processing systems should have in place effective methods of demonstrating the lawfulness of the processing, of enabling self-monitoring and of ensuring data integrity and data security, such as logs or other forms of records.
- (57) Logs should be kept at least for operations in automated processing systems such as collection, alteration, consultation, disclosure including transfers, combination or erasure. The identification of the person who consulted or disclosed personal data should be logged and from that identification it should be possible to establish the justification for the processing operations. The logs should solely be used for the verification of the lawfulness of the processing, self-monitoring, for ensuring data integrity and data security and criminal proceedings. Self-monitoring also includes internal disciplinary proceedings of competent authorities.
- (58) A data protection impact assessment should be carried out by the controller where the processing operations are likely to result in a high risk to the rights and freedoms of data subjects by virtue of their nature, scope or purposes, which should include, in particular, the measures, safeguards and mechanisms envisaged to ensure the protection of personal data and to demonstrate compliance with this Directive. Impact assessments should cover relevant systems and processes of processing operations, but not individual cases.
- (59) In order to ensure effective protection of the rights and freedoms of data subjects, the controller or processor should consult the supervisory authority, in certain cases, prior to the processing.

- (60) In order to maintain security and to prevent processing that infringes this Directive, the controller or processor should evaluate the risks inherent in the processing and should implement measures to mitigate those risks, such as encryption. Such measures should ensure an appropriate level of security, including confidentiality and take into account the state of the art, the costs of implementation in relation to the risk and the nature of the personal data to be protected. In assessing data security risks, consideration should be given to the risks that are presented by data processing, such as the accidental or unlawful destruction, loss, alteration or unauthorised disclosure of or access to personal data transmitted, stored or otherwise processed, which may, in particular, lead to physical, material or non-material damage. The controller and processor should ensure that the processing of personal data is not carried out by unauthorised persons.
- (61) A personal data breach may, if not addressed in an appropriate and timely manner, result in physical, material or non-material damage to natural persons such as loss of control over their personal data or limitation of their rights, discrimination, identity theft or fraud, financial loss, unauthorised reversal of pseudonymisation, damage to reputation, loss of confidentiality of personal data protected by professional secrecy or any other significant economic or social disadvantage to the natural person concerned. Therefore, as soon as the controller becomes aware that a personal data breach has occurred, the controller should notify the personal data breach to the supervisory authority without undue delay and, where feasible, not later than 72 hours after having become aware of it, unless the controller is able to demonstrate, in accordance with the accountability principle, that the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons. Where such notification cannot be achieved within 72 hours, the reasons for the delay should accompany the notification and information may be provided in phases without undue further delay.
- (62) Natural persons should be informed without undue delay where the personal data breach is likely to result in a high risk to the rights and freedoms of natural persons, in order to allow them to take the necessary precautions. The communication should describe the nature of the personal data breach and include recommendations for the natural person concerned to mitigate potential adverse effects. Communication to data subjects should be made as soon as reasonably feasible, in close cooperation with the supervisory authority, and respecting guidance provided by it or other relevant authorities. For example, the need to mitigate an immediate risk of damage would call for a prompt communication to data subjects, whereas the need to implement appropriate measures against continuing or similar data breaches may justify more time for the communication. Where avoiding obstruction of official or legal inquiries, investigations or procedures, avoiding prejudice to the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties, protecting public security, protecting national security or protecting the rights and freedoms of others cannot be achieved by delaying or restricting the communication of a personal data breach to the natural person concerned, such communication could, in exceptional circumstances, be omitted.
- (63) The controller should designate a person who would assist it in monitoring internal compliance with the provisions adopted pursuant to this Directive, except where a Member State decides to exempt courts and other independent judicial authorities when acting in their judicial capacity. That person could be a member of the existing staff of the controller who received special training in data protection law and practice in order to acquire expert knowledge in that field. The necessary level of expert knowledge should be determined, in particular, according to the data processing carried out and the protection required for the personal data processed by the controller. His or her task could be carried out on a part-time or full-time basis. A data protection officer may be appointed jointly by several controllers, taking into account their organisational structure and size, for example in the case of shared resources in central units. That person can also be appointed to different positions within the structure of the relevant controllers. That person should help the controller and the employees processing personal data by informing and advising them on compliance with their relevant data protection obligations. Such data protection officers should be in a position to perform their duties and tasks in an independent manner in accordance with Member State law.
- (64) Member States should ensure that a transfer to a third country or to an international organisation takes place only if necessary for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, and that the controller in the third country or international organisation is an authority competent within the meaning of this Directive. A transfer should be carried out only by competent authorities acting as controllers, except where processors are explicitly instructed to transfer on behalf of controllers. Such a transfer may take place in cases where the Commission has decided that the third country or international organisation in question ensures an adequate level of protection, where appropriate safeguards have been

provided, or where derogations for specific situations apply. Where personal data are transferred from the Union to controllers, to processors or to other recipients in third countries or international organisations, the level of protection of natural persons provided for in the Union by this Directive should not be undermined, including in cases of onward transfers of personal data from the third country or international organisation to controllers or processors in the same or in another third country or international organisation.

- (65) Where personal data are transferred from a Member State to third countries or international organisations, such a transfer should, in principle, take place only after the Member State from which the data were obtained has given its authorisation to the transfer. The interests of efficient law-enforcement cooperation require that where the nature of a threat to the public security of a Member State or a third country or to the essential interests of a Member State is so immediate as to render it impossible to obtain prior authorisation in good time, the competent authority should be able to transfer the relevant personal data to the third country or international organisation concerned without such a prior authorisation. Member States should provide that any specific conditions concerning the transfer should be communicated to third countries or international organisations. Onward transfers of personal data should be subject to prior authorisation by the competent authority that carried out the original transfer. When deciding on a request for the authorisation of an onward transfer, the competent authority that carried out the original transfer should take due account of all relevant factors, including the seriousness of the criminal offence, the specific conditions subject to which, and the purpose for which, the data was originally transferred, the nature and conditions of the execution of the criminal penalty, and the level of personal data protection in the third country or an international organisation to which personal data are onward transferred. The competent authority that carried out the original transfer should also be able to subject the onward transfer to specific conditions. Such specific conditions can be described, for example, in handling codes.
- (66) The Commission should be able to decide with effect for the entire Union that certain third countries, a territory or one or more specified sectors within a third country, or an international organisation, offer an adequate level of data protection, thus providing legal certainty and uniformity throughout the Union as regards the third countries or international organisations which are considered to provide such a level of protection. In such cases, transfers of personal data to those countries should be able to take place without the need to obtain any specific authorisation, except where another Member State from which the data were obtained has to give its authorisation to the transfer.
- (67) In line with the fundamental values on which the Union is founded, in particular the protection of human rights, the Commission should, in its assessment of the third country, or of a territory or specified sector within a third country, take into account how a particular third country respects the rule of law, access to justice as well as international human rights norms and standards and its general and sectoral law, including legislation concerning public security, defence and national security, as well as public order and criminal law. The adoption of an adequacy decision with regard to a territory or a specified sector in a third country should take into account clear and objective criteria, such as specific processing activities and the scope of applicable legal standards and legislation in force in the third country. The third country should offer guarantees ensuring an adequate level of protection essentially equivalent to that ensured within the Union, in particular where data are processed in one or several specific sectors. In particular, the third country should ensure effective independent data protection supervision and provide for cooperation mechanisms with the Member States' data protection authorities, and the data subjects should be provided with effective and enforceable rights and effective administrative and judicial redress.
- (68) Apart from the international commitments the third country or international organisation has entered into, the Commission should also take account of obligations arising from the third country's or international organisation's participation in multilateral or regional systems, in particular in relation to the protection of personal data, as well as the implementation of such obligations. In particular the third country's accession to the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to the Automatic Processing of Personal Data and its Additional Protocol should be taken into account. The Commission should consult with the European Data Protection Board established by Regulation (EU) 2016/679 (the 'Board') when assessing the level of protection in third countries or international organisations. The Commission should also take into account any relevant Commission adequacy decision adopted in accordance with Article 45 of Regulation (EU) 2016/679.
- (69) The Commission should monitor the functioning of decisions on the level of protection in a third country, a territory or a specified sector within a third country, or an international organisation. In its adequacy decisions, the Commission should provide for a periodic review mechanism of their functioning. That periodic review should be undertaken in

consultation with the third country or international organisation in question and should take into account all relevant developments in the third country or international organisation.

(70) The Commission should also be able to recognise that a third country, a territory or a specified sector within a third country, or an international organisation, no longer ensures an adequate level of data protection. Consequently, the transfer of personal data to that third country or international organisation should be prohibited unless the requirements in this Directive relating to transfers subject to appropriate safeguards and derogations for specific situations are fulfilled. Provision should be made for procedures for consultations between the Commission and such third countries or international organisations. The Commission should, in a timely manner, inform the third country or international organisation of the reasons and enter into consultations with it in order to remedy the situation.

(71) Transfers not based on such an adequacy decision should be allowed only where appropriate safeguards have been provided in a legally binding instrument which ensures the protection of personal data or where the controller has assessed all the circumstances surrounding the data transfer and, on the basis of that assessment, considers that appropriate safeguards with regard to the protection of personal data exist. Such legally binding instruments could, for example, be legally binding bilateral agreements which have been concluded by the Member States and implemented in their legal order and which could be enforced by their data subjects, ensuring compliance with data protection requirements and the rights of the data subjects, including the right to obtain effective administrative or judicial redress. The controller should be able to take into account cooperation agreements concluded between Europol or Eurojust and third countries which allow for the exchange of personal data when carrying out the assessment of all the circumstances surrounding the data transfer. The controller should be able to also take into account the fact that the transfer of personal data will be subject to confidentiality obligations and the principle of specificity, ensuring that the data will not be processed for other purposes than for the purposes of the transfer. In

addition, the controller should take into account that the personal data will not be used to request, hand down or execute a death penalty or any form of cruel and inhuman treatment. While those conditions could be considered to be appropriate safeguards allowing the transfer of data, the controller should be able to require additional safeguards.

(72) Where no adequacy decision or appropriate safeguards exist, a transfer or a category of transfers could take place only in specific situations, if necessary to protect the vital interests of the data subject or another person, or to safeguard legitimate interests of the data subject where the law of the Member State transferring the personal data so provides; for the prevention of an immediate and serious threat to the public security of a Member State or a third country; in an individual case for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security; or in an individual case for the establishment, exercise or defence of legal claims. Those derogations should be interpreted restrictively and should not allow frequent, massive and structural transfers of personal data, or large-scale transfers of data, but should be limited to data strictly necessary. Such transfers should be documented and should be made available to the supervisory authority on request in order to monitor the lawfulness of the transfer.

(73) Competent authorities of Member States apply bilateral or multilateral international agreements in force, concluded with third countries in the field of judicial cooperation in criminal matters and police cooperation, for the exchange of relevant information to allow them to perform their legally assigned tasks. In principle, this takes place through, or at least with, the cooperation of the authorities competent in the third countries concerned for the purposes of this Directive, sometimes even in the absence of a bilateral or multilateral international agreement. However, in specific individual cases, the regular procedures requiring contacting such an authority in the third country may be ineffective or inappropriate, in particular because the transfer could not be carried out in a timely manner, or because that authority in the third country does not respect the rule of law or international human rights norms and standards, so that competent authorities of Member States could decide to transfer personal data directly to recipients established in those third countries. This may be the case where there is an urgent need to transfer personal data to save the life of a person who is in danger of becoming a victim of a criminal offence or in the interest of preventing an imminent perpetration of a crime, including terrorism. Even if such a transfer between competent authorities and recipients established in third countries should take place only in specific individual cases, this Directive should provide for conditions to regulate such cases. Those provisions should not be considered to be derogations from any existing bilateral or multilateral international agreements in the field of judicial cooperation in criminal

matters and police cooperation. Those rules should apply in addition to the other rules of this Directive, in particular those on the lawfulness of processing and Chapter V.

- (74) Where personal data move across borders it may put at increased risk the ability of natural persons to exercise data protection rights to protect themselves from the unlawful use or disclosure of those data. At the same time, supervisory authorities may find that they are unable to pursue complaints or conduct investigations relating to the activities outside their borders. Their efforts to work together in the cross-border context may also be hampered by insufficient preventative or remedial powers and inconsistent legal regimes. Therefore, there is a need to promote closer cooperation among data protection supervisory authorities to help them exchange information with their foreign counterparts.
- (75) The establishment in Member States of supervisory authorities that are able to exercise their functions with complete independence is an essential component of the protection of natural persons with regard to the processing of their personal data. The supervisory authorities should monitor the application of the provisions adopted pursuant to this Directive and should contribute to their consistent application throughout the Union in order to protect natural persons with regard to the processing of their personal data. To that end, the supervisory authorities should cooperate with each other and with the Commission.
- (76) Member States may entrust a supervisory authority already established under Regulation (EU) 2016/679 with the responsibility for the tasks to be performed by the national supervisory authorities to be established under this Directive.
- (77) Member States should be allowed to establish more than one supervisory authority to reflect their constitutional, organisational and administrative structure. Each supervisory authority should be provided with the financial and human resources, premises and infrastructure, which are necessary for the effective performance of their tasks, including for the tasks related to mutual assistance and cooperation with other supervisory authorities throughout the Union. Each supervisory authority should have a separate, public annual budget, which may be part of the overall state or national budget.
- (78) Supervisory authorities should be subject to independent control or monitoring mechanisms regarding their financial expenditure, provided that such financial control does not affect their independence.
- (79) The general conditions for the member or members of the supervisory authority should be laid down by Member State law and should in particular provide that those members should be either appointed by the parliament or the government or the head of State of the Member State based on a proposal from the government or a member of the government, or the parliament or its chamber, or by an independent body entrusted by Member State law with the appointment by means of a transparent procedure. In order to ensure the independence of the supervisory authority, the member or members should act with integrity, should refrain from any action incompatible with their duties and should not, during their term of office, engage in any incompatible occupation, whether gainful or not. In order to ensure the independence of the supervisory authority, the staff should be chosen by the supervisory authority which may include an intervention by an independent body entrusted by Member State law.
- (80) While this Directive applies also to the activities of national courts and other judicial authorities, the competence of the supervisory authorities should not cover the processing of personal data where courts are acting in their judicial capacity, in order to safeguard the independence of judges in the performance of their judicial tasks. That exemption should be limited to judicial activities in court cases and not apply to other activities where judges might be involved in accordance with Member State law. Member States should also be able to provide that the competence of the supervisory authority does not cover the processing of personal data of other independent judicial authorities when acting in their judicial capacity, for example public prosecutor's office. In any event, the compliance with the rules of this Directive by the courts and other independent judicial authorities is always subject to independent supervision in accordance with Article 8(3) of the Charter.
- (81) Each supervisory authority should handle complaints lodged by any data subject and should investigate the matter or transmit it to the competent supervisory authority. The investigation following a complaint should be carried out, subject to judicial review, to the extent that is appropriate in the specific case. The supervisory authority should inform the data subject of the progress and the outcome of the complaint within a reasonable period. If the case requires further investigation or coordination with another supervisory authority, intermediate information should be provided to the data subject.
- (82) In order to ensure effective, reliable and consistent monitoring of compliance with and enforcement of this Directive throughout the Union pursuant to the TFEU as interpreted

by the Court of Justice, the supervisory authorities should have in each Member State the same tasks and effective powers, including investigative, corrective, and advisory powers which constitute necessary means to perform their tasks. However, their powers should not interfere with specific rules for criminal proceedings, including investigation and prosecution of criminal offences, or the independence of the judiciary. Without prejudice to the powers of prosecutorial authorities under Member State law, supervisory authorities should also have the power to bring infringements of this Directive to the attention of the judicial authorities or to engage in legal proceedings. The powers of supervisory authorities should be exercised in accordance with appropriate procedural safeguards laid down by Union and Member State law, impartially, fairly and within a reasonable time. In particular each measure should be appropriate, necessary and proportionate in view of ensuring compliance with this Directive, taking into account the circumstances of each individual case, respect the right of every person to be heard before any individual measure that would adversely affect the person concerned is taken, and avoiding superfluous costs and excessive inconvenience to the person concerned. Investigative powers as regards access to premises should be exercised in accordance with specific requirements in Member State law, such as the requirement to obtain a prior judicial authorisation. The adoption of a legally binding decision should be subject to judicial review in the Member State of the supervisory authority that adopted the decision.

- (83) The supervisory authorities should assist one another in performing their tasks and provide mutual assistance, so as to ensure the consistent application and enforcement of the provisions adopted pursuant to this Directive.
- (84) The Board should contribute to the consistent application of this Directive throughout the Union, including advising the Commission and promoting the cooperation of the supervisory authorities throughout the Union.
- (85) Every data subject should have the right to lodge a complaint with a single supervisory authority and to an effective judicial remedy in accordance with Article 47 of the Charter where the data subject considers that his or her rights under provisions adopted pursuant to this Directive are infringed or where the supervisory authority does not act on a complaint, partially or wholly rejects or dismisses a complaint or does not act where such action is necessary to protect the rights of the data subject. The investigation following a complaint should be carried out, subject to judicial review, to the extent that is appropriate in the specific case. The competent supervisory authority should inform the data subject of the progress and the outcome of the complaint within a reasonable period. If the case requires further investigation or coordination with another supervisory authority, intermediate information should be provided to the data subject. In order to facilitate the submission of complaints, each supervisory authority should take measures such as providing a complaint submission form which can also be completed electronically, without excluding other means of communication.
- (86) Each natural or legal person should have the right to an effective judicial remedy before the competent national court against a decision of a supervisory authority which produces legal effects concerning that person. Such a decision concerns in particular the exercise of investigative, corrective and authorisation powers by the supervisory authority or the dismissal or rejection of complaints. However, that right does not encompass other measures of supervisory authorities which are not legally binding, such as opinions issued by or advice provided by the supervisory authority. Proceedings against a supervisory authority should be brought before the courts of the Member State where the supervisory authority is established and should be conducted in accordance with Member State law. Those courts should exercise full jurisdiction which should include jurisdiction to examine all questions of fact and law relevant to the dispute before it.
- (87) Where a data subject considers that his or her rights under this Directive are infringed, he or she should have the right to mandate a body which aims to protect the rights and interests of data subjects in relation to the protection of their personal data and is constituted according to Member State law to lodge a complaint on his or her behalf with a supervisory authority and to exercise the right to a judicial remedy. The right of representation of data subjects should be without prejudice to Member State procedural law which may require mandatory representation of data subjects by a lawyer, as defined in Council Directive 77/249/EEC ⁽¹⁰⁾, before national courts.
- (88) Any damage which a person may suffer as a result of processing that infringes the provisions adopted pursuant to this Directive should be compensated by the controller or any other authority competent under Member State law. The concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives of this Directive. This is without prejudice to any claims for damage deriving from the violation of other rules in Union or Member State law. When reference is made to processing that is unlawful or that infringes the provisions

adopted pursuant to this Directive it also covers processing that infringes implementing acts adopted pursuant to this Directive. Data subjects should receive full and effective compensation for the damage that they have suffered.

- (89) Penalties should be imposed on any natural or legal person, whether governed by private or public law, who infringes this Directive. Member States should ensure that the penalties are effective, proportionate and dissuasive and should take all measures to implement the penalties.
- (90) In order to ensure uniform conditions for the implementation of this Directive, implementing powers should be conferred on the Commission with regard to the adequate level of protection afforded by a third country, a territory or a specified sector within a third country, or an international organisation and the format and procedures for mutual assistance and the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the Board. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council ⁽¹¹⁾.
- (91) The examination procedure should be used for the adoption of implementing acts on the adequate level of protection afforded by a third country, a territory or a specified sector within a third country, or an international organisation and on the format and procedures for mutual assistance and the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the Board, given that those acts are of a general scope.
- (92) The Commission should adopt immediately applicable implementing acts where, in duly justified cases relating to a third country, a territory or a specified sector within a third country, or an international organisation which no longer ensure an adequate level of protection, imperative grounds of urgency so require.
- (93) Since the objectives of this Directive, namely to protect the fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data and to ensure the free exchange of personal data by competent authorities within the Union, cannot be sufficiently achieved by the Member States and can rather, by reason of the scale or effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the TEU. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives
- (94) Specific provisions of acts of the Union adopted in the field of judicial cooperation in criminal matters and police cooperation which were adopted prior to the date of the adoption of this Directive, regulating the processing of personal data between Member States or the access of designated authorities of Member States to information systems established pursuant to the Treaties, should remain unaffected, such as, for example, the specific provisions concerning the protection of personal data applied pursuant to Council Decision 2008/615/JHA ⁽¹²⁾, or Article 23 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union ⁽¹³⁾. Since Article 8 of the Charter and Article 16 TFEU require that the fundamental right to the protection of personal data be ensured in a consistent manner throughout the Union, the Commission should evaluate the situation with regard to the relationship between this Directive and the acts adopted prior to the date of adoption of this Directive regulating the processing of personal data between Member States or the access of designated authorities of Member States to information systems established pursuant to the Treaties, in order to assess the need for alignment of those specific provisions with this Directive. Where appropriate, the Commission should make proposals with a view to ensuring consistent legal rules relating to the processing of personal data.
- (95) In order to ensure a comprehensive and consistent protection of personal data in the Union, international agreements which were concluded by Member States prior to the date of entry into force of this Directive and which comply with the relevant Union law applicable prior to that date should remain in force until amended, replaced or revoked.
- (96) Member States should be allowed a period of not more than two years from the date of entry into force of this Directive to transpose it. Processing already under way on that date should be brought into conformity with this Directive within the period of two years after which this Directive enters into force. However, where such processing complies with the Union law applicable prior to the date of entry into force of this Directive, the requirements of this Directive concerning the prior consultation of the supervisory authority should not apply to the processing operations already under way on that date given that those requirements, by their very nature, are to be met prior to the processing. Where Member States use the longer implementation period expiring seven years after the date of entry into force of this Directive for meeting the logging obligations for

automated processing systems set up prior to that date, the controller or the processor should have in place effective methods for demonstrating the lawfulness of the data processing, for enabling self-monitoring and for ensuring data integrity and data security, such as logs or other forms of records.

- (97) This Directive is without prejudice to the rules on combating the sexual abuse and sexual exploitation of children and child pornography as laid down in Directive 2011/93/EU of the European Parliament and of the Council ⁽¹⁴⁾.
- (98) Framework Decision 2008/977/JHA should therefore be repealed.
- (99) In accordance with Article 6a of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, as annexed to the TEU and to the TFEU, the United Kingdom and Ireland are not bound by the rules laid down in this Directive which relate to the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three of the TFEU where the United Kingdom and Ireland are not bound by the rules governing the forms of judicial cooperation in criminal matters or police cooperation which require compliance with the provisions laid down on the basis of Article 16 TFEU.
- (100) In accordance with Articles 2 and 2a of Protocol No 22 on the position of Denmark, as annexed to the TEU and to the TFEU, Denmark is not bound by the rules laid down in this Directive or subject to their application which relate to the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three of the TFEU. Given that this Directive builds upon the Schengen *acquis*, under Title V of Part Three of the TFEU, Denmark, in accordance with Article 4 of that Protocol, is to decide within six months after adoption of this Directive whether it will implement it in its national law.
- (101) As regards Iceland and Norway, this Directive constitutes a development of provisions of the Schengen *acquis*, as provided for by the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis* ⁽¹⁵⁾.
- (102) As regards Switzerland, this Directive constitutes a development of provisions of the Schengen *acquis*, as provided for by the Agreement between the European Union, the European Community and the Swiss Confederation concerning the association of the Swiss Confederation with the implementation, application and development of the Schengen *acquis* ⁽¹⁶⁾.
- (103) As regards Liechtenstein, this Directive constitutes a development of provisions of the Schengen *acquis*, as provided for by the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* ⁽¹⁷⁾.
- (104) This Directive respects the fundamental rights and observes the principles recognised in the Charter as enshrined in the TFEU, in particular the right to respect for private and family life, the right to the protection of personal data, the right to an effective remedy and to a fair trial. Limitations placed on those rights are in accordance with Article 52(1) of the Charter as they are necessary to meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
- (105) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition measures. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (106) The European Data Protection Supervisor was consulted in accordance with Article 28(2) of Regulation (EC) No 45/2001 and delivered an opinion on 7 March 2012 ⁽¹⁸⁾.
- (107) This Directive should not preclude Member States from implementing the exercise of the rights of data subjects on information, access to and rectification or erasure of personal data and restriction of processing in the course of criminal proceedings, and their possible restrictions thereto, in national rules on criminal procedure,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

General provisions

Article 1

Subject-matter and objectives

1. This Directive lays down the rules relating to the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.
2. In accordance with this Directive, Member States shall:
 - (a) protect the fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data; and
 - (b) ensure that the exchange of personal data by competent authorities within the Union, where such exchange is required by Union or Member State law, is neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data.
3. This Directive shall not preclude Member States from providing higher safeguards than those established in this Directive for the protection of the rights and freedoms of the data subject with regard to the processing of personal data by competent authorities.

Article 2

Scope

1. This Directive applies to the processing of personal data by competent authorities for the purposes set out in Article 1(1).
2. This Directive applies to the processing of personal data wholly or partly by automated means, and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.
3. This Directive does not apply to the processing of personal data:
 - (a) in the course of an activity which falls outside the scope of Union law;
 - (b) by the Union institutions, bodies, offices and agencies.

Article 3

Definitions

For the purposes of this Directive:

- (1) 'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;
- (2) 'processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;
- (3) 'restriction of processing' means the marking of stored personal data with the aim of limiting their processing in the future;
- (4) 'profiling' means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements;
- (5) 'pseudonymisation' means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person;

- (6) 'filing system' means any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis;
- (7) 'competent authority' means:
- (a) any public authority competent for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security; or
 - (b) any other body or entity entrusted by Member State law to exercise public authority and public powers for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security;
- (8) 'controller' means the competent authority which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law;
- (9) 'processor' means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller;
- (10) 'recipient' means a natural or legal person, public authority, agency or another body, to which the personal data are disclosed, whether a third party or not. However, public authorities which may receive personal data in the framework of a particular inquiry in accordance with Member State law shall not be regarded as recipients; the processing of those data by those public authorities shall be in compliance with the applicable data protection rules according to the purposes of the processing;
- (11) 'personal data breach' means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed;
- (12) 'genetic data' means personal data, relating to the inherited or acquired genetic characteristics of a natural person which give unique information about the physiology or the health of that natural person and which result, in particular, from an analysis of a biological sample from the natural person in question;
- (13) 'biometric data' means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data;
- (14) 'data concerning health' means personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status;
- (15) 'supervisory authority' means an independent public authority which is established by a Member State pursuant to Article 41;
- (16) 'international organisation' means an organisation and its subordinate bodies governed by public international law, or any other body which is set up by, or on the basis of, an agreement between two or more countries.

CHAPTER II

Principles

Article 4

Principles relating to processing of personal data

1. Member States shall provide for personal data to be:
 - (a) processed lawfully and fairly;
 - (b) collected for specified, explicit and legitimate purposes and not processed in a manner that is incompatible with those purposes;
 - (c) adequate, relevant and not excessive in relation to the purposes for which they are processed;
 - (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which

- they are processed, are erased or rectified without delay;
- (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which they are processed;
 - (f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures.
2. Processing by the same or another controller for any of the purposes set out in Article 1(1) other than that for which the personal data are collected shall be permitted in so far as:
- (a) the controller is authorised to process such personal data for such a purpose in accordance with Union or Member State law; and
 - (b) processing is necessary and proportionate to that other purpose in accordance with Union or Member State law.
3. Processing by the same or another controller may include archiving in the public interest, scientific, statistical or historical use, for the purposes set out in Article 1(1), subject to appropriate safeguards for the rights and freedoms of data subjects.
4. The controller shall be responsible for, and be able to demonstrate compliance with, paragraphs 1, 2 and 3.

Article 5

Time-limits for storage and review

Member States shall provide for appropriate time limits to be established for the erasure of personal data or for a periodic review of the need for the storage of personal data. Procedural measures shall ensure that those time limits are observed.

Article 6

Distinction between different categories of data subject

Member States shall provide for the controller, where applicable and as far as possible, to make a clear distinction between personal data of different categories of data subjects, such as:

- (a) persons with regard to whom there are serious grounds for believing that they have committed or are about to commit a criminal offence;
- (b) persons convicted of a criminal offence;
- (c) victims of a criminal offence or persons with regard to whom certain facts give rise to reasons for believing that he or she could be the victim of a criminal offence; and
- (d) other parties to a criminal offence, such as persons who might be called on to testify in investigations in connection with criminal offences or subsequent criminal proceedings, persons who can provide information on criminal offences, or contacts or associates of one of the persons referred to in points (a) and (b).

Article 7

Distinction between personal data and verification of quality of personal data

1. Member States shall provide for personal data based on facts to be distinguished, as far as possible, from personal data based on personal assessments.
2. Member States shall provide for the competent authorities to take all reasonable steps to ensure that personal data which are inaccurate, incomplete or no longer up to date are not transmitted or made available. To that end, each competent authority shall, as far as practicable, verify the quality of personal data before they are transmitted or made available. As far as possible, in all transmissions of personal data, necessary information enabling the receiving competent authority to assess the degree of accuracy, completeness and reliability of personal data, and the extent to which they are up to date shall be added.
3. If it emerges that incorrect personal data have been transmitted or personal data have been unlawfully transmitted, the recipient shall be notified without delay. In such a case, the personal data shall be rectified or erased or processing shall be restricted in accordance with Article 16.

Article 8

Lawfulness of processing

1. Member States shall provide for processing to be lawful only if and to the extent that processing is necessary for the performance of a task carried out by a competent authority for the purposes set out in Article 1(1) and that it is based on Union or Member State law.

2. Member State law regulating processing within the scope of this Directive shall specify at least the objectives of processing, the personal data to be processed and the purposes of the processing.

Article 9

Specific processing conditions

1. Personal data collected by competent authorities for the purposes set out in Article 1(1) shall not be processed for purposes other than those set out in Article 1(1) unless such processing is authorised by Union or Member State law. Where personal data are processed for such other purposes, Regulation (EU) 2016/679 shall apply unless the processing is carried out in an activity which falls outside the scope of Union law.
2. Where competent authorities are entrusted by Member State law with the performance of tasks other than those performed for the purposes set out in Article 1(1), Regulation (EU) 2016/679 shall apply to processing for such purposes, including for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, unless the processing is carried out in an activity which falls outside the scope of Union law.
3. Member States shall, where Union or Member State law applicable to the transmitting competent authority provides specific conditions for processing, provide for the transmitting competent authority to inform the recipient of such personal data of those conditions and the requirement to comply with them.
4. Member States shall provide for the transmitting competent authority not to apply conditions pursuant to paragraph 3 to recipients in other Member States or to agencies, offices and bodies established pursuant to Chapters 4 and 5 of Title V of the TFEU other than those applicable to similar transmissions of data within the Member State of the transmitting competent authority.

Article 10

Processing of special categories of personal data

Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be allowed only where strictly necessary, subject to appropriate safeguards for the rights and freedoms of the data subject, and only:

- (a) where authorised by Union or Member State law;
- (b) to protect the vital interests of the data subject or of another natural person; or
- (c) where such processing relates to data which are manifestly made public by the data subject.

Article 11

Automated individual decision-making

1. Member States shall provide for a decision based solely on automated processing, including profiling, which produces an adverse legal effect concerning the data subject or significantly affects him or her, to be prohibited unless authorised by Union or Member State law to which the controller is subject and which provides appropriate safeguards for the rights and freedoms of the data subject, at least the right to obtain human intervention on the part of the controller.
2. Decisions referred to in paragraph 1 of this Article shall not be based on special categories of personal data referred to in Article 10, unless suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place.
3. Profiling that results in discrimination against natural persons on the basis of special categories of personal data referred to in Article 10 shall be prohibited, in accordance with Union law.

CHAPTER III

Rights of the data subject

Article 12

Communication and modalities for exercising the rights of the data subject

1. Member States shall provide for the controller to take reasonable steps to provide any information referred to in Article 13 and make any communication with regard to Articles 11, 14 to 18 and 31 relating to processing to the data subject in a concise, intelligible and easily

accessible form, using clear and plain language. The information shall be provided by any appropriate means, including by electronic means. As a general rule, the controller shall provide the information in the same form as the request.

2. Member States shall provide for the controller to facilitate the exercise of the rights of the data subject under Articles 11 and 14 to 18.

3. Member States shall provide for the controller to inform the data subject in writing about the follow up to his or her request without undue delay.

4. Member States shall provide for the information provided under Article 13 and any communication made or action taken pursuant to Articles 11, 14 to 18 and 31 to be provided free of charge. Where requests from a data subject are manifestly unfounded or excessive, in particular because of their repetitive character, the controller may either:

- (a) charge a reasonable fee, taking into account the administrative costs of providing the information or communication or taking the action requested; or
- (b) refuse to act on the request.

The controller shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request.

5. Where the controller has reasonable doubts concerning the identity of the natural person making a request referred to in Article 14 or 16, the controller may request the provision of additional information necessary to confirm the identity of the data subject.

Article 13

Information to be made available or given to the data subject

1. Member States shall provide for the controller to make available to the data subject at least the following information:

- (a) the identity and the contact details of the controller;
- (b) the contact details of the data protection officer, where applicable;
- (c) the purposes of the processing for which the personal data are intended;
- (d) the right to lodge a complaint with a supervisory authority and the contact details of the supervisory authority;
- (e) the existence of the right to request from the controller access to and rectification or erasure of personal data and restriction of processing of the personal data concerning the data subject.

2. In addition to the information referred to in paragraph 1, Member States shall provide by law for the controller to give to the data subject, in specific cases, the following further information to enable the exercise of his or her rights:

- (a) the legal basis for the processing;
- (b) the period for which the personal data will be stored, or, where that is not possible, the criteria used to determine that period;
- (c) where applicable, the categories of recipients of the personal data, including in third countries or international organisations;
- (d) where necessary, further information, in particular where the personal data are collected without the knowledge of the data subject.

3. Member States may adopt legislative measures delaying, restricting or omitting the provision of the information to the data subject pursuant to paragraph 2 to the extent that, and for as long as, such a measure constitutes a necessary and proportionate measure in a democratic society with due regard for the fundamental rights and the legitimate interests of the natural person concerned, in order to:

- (a) avoid obstructing official or legal inquiries, investigations or procedures;
- (b) avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties;
- (c) protect public security;
- (d) protect national security;
- (e) protect the rights and freedoms of others.

4. Member States may adopt legislative measures in order to determine categories of processing which may wholly or partly fall under any of the points listed in paragraph 3.

Article 14

Right of access by the data subject

Subject to Article 15, Member States shall provide for the right of the data subject to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information:

- (a) the purposes of and legal basis for the processing;
- (b) the categories of personal data concerned;
- (c) the recipients or categories of recipients to whom the personal data have been disclosed, in particular recipients in third countries or international organisations;
- (d) where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period;
- (e) the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject;
- (f) the right to lodge a complaint with the supervisory authority and the contact details of the supervisory authority;
- (g) communication of the personal data undergoing processing and of any available information as to their origin.

Article 15

Limitations to the right of access

1. Member States may adopt legislative measures restricting, wholly or partly, the data subject's right of access to the extent that, and for as long as such a partial or complete restriction constitutes a necessary and proportionate measure in a democratic society with due regard for the fundamental rights and legitimate interests of the natural person concerned, in order to:

- (a) avoid obstructing official or legal inquiries, investigations or procedures;
- (b) avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties;
- (c) protect public security;
- (d) protect national security;
- (e) protect the rights and freedoms of others.

2. Member States may adopt legislative measures in order to determine categories of processing which may wholly or partly fall under points (a) to (e) of paragraph 1.

3. In the cases referred to in paragraphs 1 and 2, Member States shall provide for the controller to inform the data subject, without undue delay, in writing of any refusal or restriction of access and of the reasons for the refusal or the restriction. Such information may be omitted where the provision thereof would undermine a purpose under paragraph 1. Member States shall provide for the controller to inform the data subject of the possibility of lodging a complaint with a supervisory authority or seeking a judicial remedy.

4. Member States shall provide for the controller to document the factual or legal reasons on which the decision is based. That information shall be made available to the supervisory authorities.

Article 16

Right to rectification or erasure of personal data and restriction of processing

1. Member States shall provide for the right of the data subject to obtain from the controller without undue delay the rectification of inaccurate personal data relating to him or her. Taking into account the purposes of the processing, Member States shall provide for the data subject to have the right to have incomplete personal data completed, including by means of providing a supplementary statement.

2. Member States shall require the controller to erase personal data without undue delay and provide for the right of the data subject to obtain from the controller the erasure of personal data concerning him or her without undue delay where processing infringes the provisions adopted pursuant to Article 4, 8 or 10, or where personal data must be erased in order to comply with a legal obligation to which the controller is subject.

3. Instead of erasure, the controller shall restrict processing where:

- (a) the accuracy of the personal data is contested by the data subject and their accuracy or inaccuracy cannot be ascertained; or
- (b) the personal data must be maintained for the purposes of evidence.

Where processing is restricted pursuant to point (a) of the first subparagraph, the controller shall inform the data subject before lifting the restriction of processing.

4. Member States shall provide for the controller to inform the data subject in writing of any refusal of rectification or erasure of personal data or restriction of processing and of the reasons for the refusal. Member States may adopt legislative measures restricting, wholly or partly, the obligation to provide such information to the extent that such a restriction constitutes a necessary and proportionate measure in a democratic society with due regard for the fundamental rights and legitimate interests of the natural person concerned in order to:

- (a) avoid obstructing official or legal inquiries, investigations or procedures;
- (b) avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties;
- (c) protect public security;
- (d) protect national security;
- (e) protect the rights and freedoms of others.

Member States shall provide for the controller to inform the data subject of the possibility of lodging a complaint with a supervisory authority or seeking a judicial remedy.

5. Member States shall provide for the controller to communicate the rectification of inaccurate personal data to the competent authority from which the inaccurate personal data originate.

6. Member States shall, where personal data has been rectified or erased or processing has been restricted pursuant to paragraphs 1, 2 and 3, provide for the controller to notify the recipients and that the recipients shall rectify or erase the personal data or restrict processing of the personal data under their responsibility.

Article 17

Exercise of rights by the data subject and verification by the supervisory authority

1. In the cases referred to in Article 13(3), Article 15(3) and Article 16(4) Member States shall adopt measures providing that the rights of the data subject may also be exercised through the competent supervisory authority.
2. Member States shall provide for the controller to inform the data subject of the possibility of exercising his or her rights through the supervisory authority pursuant to paragraph 1.
3. Where the right referred to in paragraph 1 is exercised, the supervisory authority shall inform the data subject at least that all necessary verifications or a review by the supervisory authority have taken place. The supervisory authority shall also inform the data subject of his or her right to seek a judicial remedy.

Article 18

Rights of the data subject in criminal investigations and proceedings

Member States may provide for the exercise of the rights referred to in Articles 13, 14 and 16 to be carried out in accordance with Member State law where the personal data are contained in a judicial decision or record or case file processed in the course of criminal investigations and proceedings.

CHAPTER IV

Controller and processor

Section 1

General obligations

Article 19

Obligations of the controller

1. Member States shall provide for the controller, taking into account the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons, to implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with this Directive. Those measures shall be reviewed and updated where necessary.

2. Where proportionate in relation to the processing activities, the measures referred to in paragraph 1 shall include the implementation of appropriate data protection policies by the controller.

Article 20

Data protection by design and by default

1. Member States shall provide for the controller, taking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing, as well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing, both at the time of the determination of the means for processing and at the time of the processing itself, to implement appropriate technical and organisational measures, such as pseudonymisation, which are designed to implement data protection principles, such as data minimisation, in an effective manner and to integrate the necessary safeguards into the processing, in order to meet the requirements of this Directive and protect the rights of data subjects.

2. Member States shall provide for the controller to implement appropriate technical and organisational measures ensuring that, by default, only personal data which are necessary for each specific purpose of the processing are processed. That obligation applies to the amount of personal data collected, the extent of their processing, the period of their storage and their accessibility. In particular, such measures shall ensure that by default personal data are not made accessible without the individual's intervention to an indefinite number of natural persons.

Article 21

Joint controllers

1. Member States shall, where two or more controllers jointly determine the purposes and means of processing, provide for them to be joint controllers. They shall, in a transparent manner, determine their respective responsibilities for compliance with this Directive, in particular as regards the exercise of the rights of the data subject and their respective duties to provide the information referred to in Article 13, by means of an arrangement between them unless, and in so far as, the respective responsibilities of the controllers are determined by Union or Member State law to which the controllers are subject. The arrangement shall designate the contact point for data subjects. Member States may designate which of the joint controllers can act as a single contact point for data subjects to exercise their rights.

2. Irrespective of the terms of the arrangement referred to in paragraph 1, Member States may provide for the data subject to exercise his or her rights under the provisions adopted pursuant to this Directive in respect of and against each of the controllers.

Article 22

Processor

1. Member States shall, where processing is to be carried out on behalf of a controller, provide for the controller to use only processors providing sufficient guarantees to implement appropriate technical and organisational measures in such a manner that the processing will meet the requirements of this Directive and ensure the protection of the rights of the data subject.

2. Member States shall provide for the processor not to engage another processor without prior specific or general written authorisation by the controller. In the case of general written authorisation, the processor shall inform the controller of any intended changes concerning the addition or replacement of other processors, thereby giving the controller the opportunity to object to such changes.

3. Member States shall provide for the processing by a processor to be governed by a contract or other legal act under Union or Member State law, that is binding on the processor with regard to the controller and that sets out the subject-matter and duration of the processing, the nature and purpose of the processing, the type of personal data and categories of data subjects and the obligations and rights of the controller. That contract or other legal act shall stipulate, in particular, that the processor:

- (a) acts only on instructions from the controller;
- (b) ensures that persons authorised to process the personal data have committed themselves to confidentiality or are under an appropriate statutory obligation of confidentiality;
- (c) assists the controller by any appropriate means to ensure compliance with the provisions on the data subject's rights;
- (d) at the choice of the controller, deletes or returns all the personal data to the controller after the end of the provision of data processing services, and deletes existing copies

unless Union or Member State law requires storage of the personal data;

- (e) makes available to the controller all information necessary to demonstrate compliance with this Article;
 - (f) complies with the conditions referred to in paragraphs 2 and 3 for engaging another processor.
4. The contract or the other legal act referred to in paragraph 3 shall be in writing, including in an electronic form.
5. If a processor determines, in infringement of this Directive, the purposes and means of processing, that processor shall be considered to be a controller in respect of that processing.

Article 23

Processing under the authority of the controller or processor

Member States shall provide for the processor and any person acting under the authority of the controller or of the processor, who has access to personal data, not to process those data except on instructions from the controller, unless required to do so by Union or Member State law.

Article 24

Records of processing activities

1. Member States shall provide for controllers to maintain a record of all categories of processing activities under their responsibility. That record shall contain all of the following information:
- (a) the name and contact details of the controller and, where applicable, the joint controller and the data protection officer;
 - (b) the purposes of the processing;
 - (c) the categories of recipients to whom the personal data have been or will be disclosed including recipients in third countries or international organisations;
 - (d) a description of the categories of data subject and of the categories of personal data;
 - (e) where applicable, the use of profiling;
 - (f) where applicable, the categories of transfers of personal data to a third country or an international organisation;
 - (g) an indication of the legal basis for the processing operation, including transfers, for which the personal data are intended;
 - (h) where possible, the envisaged time limits for erasure of the different categories of personal data;
 - (i) where possible, a general description of the technical and organisational security measures referred to in Article 29(1).
2. Member States shall provide for each processor to maintain a record of all categories of processing activities carried out on behalf of a controller, containing:
- (a) the name and contact details of the processor or processors, of each controller on behalf of which the processor is acting and, where applicable, the data protection officer;
 - (b) the categories of processing carried out on behalf of each controller;
 - (c) where applicable, transfers of personal data to a third country or an international organisation where explicitly instructed to do so by the controller, including the identification of that third country or international organisation;
 - (d) where possible, a general description of the technical and organisational security measures referred to in Article 29(1).
3. The records referred to in paragraphs 1 and 2 shall be in writing, including in electronic form.

The controller and the processor shall make those records available to the supervisory authority on request.

Article 25

Logging

1. Member States shall provide for logs to be kept for at least the following processing

operations in automated processing systems: collection, alteration, consultation, disclosure including transfers, combination and erasure. The logs of consultation and disclosure shall make it possible to establish the justification, date and time of such operations and, as far as possible, the identification of the person who consulted or disclosed personal data, and the identity of the recipients of such personal data.

2. The logs shall be used solely for verification of the lawfulness of processing, self-monitoring, ensuring the integrity and security of the personal data, and for criminal proceedings.

3. The controller and the processor shall make the logs available to the supervisory authority on request.

Article 26

Cooperation with the supervisory authority

Member States shall provide for the controller and the processor to cooperate, on request, with the supervisory authority in the performance of its tasks on request.

Article 27

Data protection impact assessment

1. Where a type of processing, in particular, using new technologies, and taking into account the nature, scope, context and purposes of the processing is likely to result in a high risk to the rights and freedoms of natural persons, Member States shall provide for the controller to carry out, prior to the processing, an assessment of the impact of the envisaged processing operations on the protection of personal data.

2. The assessment referred to in paragraph 1 shall contain at least a general description of the envisaged processing operations, an assessment of the risks to the rights and freedoms of data subjects, the measures envisaged to address those risks, safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with this Directive, taking into account the rights and legitimate interests of the data subjects and other persons concerned.

Article 28

Prior consultation of the supervisory authority

1. Member States shall provide for the controller or processor to consult the supervisory authority prior to processing which will form part of a new filing system to be created, where:

- (a) a data protection impact assessment as provided for in Article 27 indicates that the processing would result in a high risk in the absence of measures taken by the controller to mitigate the risk; or
- (b) the type of processing, in particular, where using new technologies, mechanisms or procedures, involves a high risk to the rights and freedoms of data subjects.

2. Member States shall provide for the supervisory authority to be consulted during the preparation of a proposal for a legislative measure to be adopted by a national parliament or of a regulatory measure based on such a legislative measure, which relates to processing.

3. Member States shall provide that the supervisory authority may establish a list of the processing operations which are subject to prior consultation pursuant to paragraph 1.

4. Member States shall provide for the controller to provide the supervisory authority with the data protection impact assessment pursuant to Article 27 and, on request, with any other information to allow the supervisory authority to make an assessment of the compliance of the processing and in particular of the risks for the protection of personal data of the data subject and of the related safeguards.

5. Member States shall, where the supervisory authority is of the opinion that the intended processing referred to in paragraph 1 of this Article would infringe the provisions adopted pursuant to this Directive, in particular where the controller has insufficiently identified or mitigated the risk, provide for the supervisory authority to provide, within a period of up to six weeks of receipt of the request for consultation, written advice to the controller and, where applicable, to the processor, and may use any of its powers referred to in Article 47. That period may be extended by a month, taking into account the complexity of the intended processing. The supervisory authority shall inform the controller and, where applicable, the processor of any such extension within one month of receipt of the request for consultation, together with the reasons for the delay.

Section 2

Security of personal data

Security of processing

1. Member States shall provide for the controller and the processor, taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of the processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, to implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk, in particular as regards the processing of special categories of personal data referred to in Article 10.
2. In respect of automated processing, each Member State shall provide for the controller or processor, following an evaluation of the risks, to implement measures designed to:
 - (a) deny unauthorised persons access to processing equipment used for processing ('equipment access control');
 - (b) prevent the unauthorised reading, copying, modification or removal of data media ('data media control');
 - (c) prevent the unauthorised input of personal data and the unauthorised inspection, modification or deletion of stored personal data ('storage control');
 - (d) prevent the use of automated processing systems by unauthorised persons using data communication equipment ('user control');
 - (e) ensure that persons authorised to use an automated processing system have access only to the personal data covered by their access authorisation ('data access control');
 - (f) ensure that it is possible to verify and establish the bodies to which personal data have been or may be transmitted or made available using data communication equipment ('communication control');
 - (g) ensure that it is subsequently possible to verify and establish which personal data have been input into automated processing systems and when and by whom the personal data were input ('input control');
 - (h) prevent the unauthorised reading, copying, modification or deletion of personal data during transfers of personal data or during transportation of data media ('transport control');
 - (i) ensure that installed systems may, in the case of interruption, be restored ('recovery');
 - (j) ensure that the functions of the system perform, that the appearance of faults in the functions is reported ('reliability') and that stored personal data cannot be corrupted by means of a malfunctioning of the system ('integrity').

Article 30

Notification of a personal data breach to the supervisory authority

1. Member States shall, in the case of a personal data breach, provide for the controller to notify without undue delay and, where feasible, not later than 72 hours after having become aware of it, the personal data breach to the supervisory authority, unless the personal data breach is unlikely to result in a risk to the rights and freedoms of natural persons. Where the notification to the supervisory authority is not made within 72 hours, it shall be accompanied by reasons for the delay.
2. The processor shall notify the controller without undue delay after becoming aware of a personal data breach.
3. The notification referred to in paragraph 1 shall at least:
 - (a) describe the nature of the personal data breach including, where possible, the categories and approximate number of data subjects concerned and the categories and approximate number of personal data records concerned;
 - (b) communicate the name and contact details of the data protection officer or other contact point where more information can be obtained;
 - (c) describe the likely consequences of the personal data breach;
 - (d) describe the measures taken or proposed to be taken by the controller to address the personal data breach, including, where appropriate, measures to mitigate its possible adverse effects.
4. Where, and in so far as, it is not possible to provide the information at the same time, the information may be provided in phases without undue further delay.
5. Member States shall provide for the controller to document any personal data breaches

referred to in paragraph 1, comprising the facts relating to the personal data breach, its effects and the remedial action taken. That documentation shall enable the supervisory authority to verify compliance with this Article.

6. Member States shall, where the personal data breach involves personal data that have been transmitted by or to the controller of another Member State, provide for the information referred to in paragraph 3 to be communicated to the controller of that Member State without undue delay.

Article 31

Communication of a personal data breach to the data subject

1. Member States shall, where the personal data breach is likely to result in a high risk to the rights and freedoms of natural persons, provide for the controller to communicate the personal data breach to the data subject without undue delay.

2. The communication to the data subject referred to in paragraph 1 of this Article shall describe in clear and plain language the nature of the personal data breach and shall contain at least the information and measures referred to in points (b), (c) and (d) of Article 30(3).

3. The communication to the data subject referred to in paragraph 1 shall not be required if any of the following conditions are met:

- (a) the controller has implemented appropriate technological and organisational protection measures, and those measures were applied to the personal data affected by the personal data breach, in particular those that render the personal data unintelligible to any person who is not authorised to access it, such as encryption;
- (b) the controller has taken subsequent measures which ensure that the high risk to the rights and freedoms of data subjects referred to in paragraph 1 is no longer likely to materialise;
- (c) it would involve a disproportionate effort. In such a case, there shall instead be a public communication or a similar measure whereby the data subjects are informed in an equally effective manner.

4. If the controller has not already communicated the personal data breach to the data subject, the supervisory authority, having considered the likelihood of the personal data breach resulting in a high risk, may require it to do so, or may decide that any of the conditions referred to in paragraph 3 are met.

5. The communication to the data subject referred to in paragraph 1 of this Article may be delayed, restricted or omitted subject to the conditions and on the grounds referred to in Article 13(3).

Section 3

Data protection officer

Article 32

Designation of the data protection officer

1. Member States shall provide for the controller to designate a data protection officer. Member States may exempt courts and other independent judicial authorities when acting in their judicial capacity from that obligation.

2. The data protection officer shall be designated on the basis of his or her professional qualities and, in particular, his or her expert knowledge of data protection law and practice and ability to fulfil the tasks referred to in Article 34.

3. A single data protection officer may be designated for several competent authorities, taking account of their organisational structure and size.

4. Member States shall provide for the controller to publish the contact details of the data protection officer and communicate them to the supervisory authority.

Article 33

Position of the data protection officer

1. Member States shall provide for the controller to ensure that the data protection officer is involved, properly and in a timely manner, in all issues which relate to the protection of personal data.

2. The controller shall support the data protection officer in performing the tasks referred to in Article 34 by providing resources necessary to carry out those tasks and access to personal data and processing operations, and to maintain his or her expert knowledge.

Tasks of the data protection officer

Member States shall provide for the controller to entrust the data protection officer at least with the following tasks:

- (a) to inform and advise the controller and the employees who carry out processing of their obligations pursuant to this Directive and to other Union or Member State data protection provisions;
- (b) to monitor compliance with this Directive, with other Union or Member State data protection provisions and with the policies of the controller in relation to the protection of personal data, including the assignment of responsibilities, awareness-raising and training of staff involved in processing operations, and the related audits;
- (c) to provide advice where requested as regards the data protection impact assessment and monitor its performance pursuant to Article 27;
- (d) to cooperate with the supervisory authority;
- (e) to act as the contact point for the supervisory authority on issues relating to processing, including the prior consultation referred to in Article 28, and to consult, where appropriate, with regard to any other matter.

CHAPTER V

Transfers of personal data to third countries or international organisations

General principles for transfers of personal data

1. Member States shall provide for any transfer by competent authorities of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation including for onward transfers to another third country or international organisation to take place, subject to compliance with the national provisions adopted pursuant to other provisions of this Directive, only where the conditions laid down in this Chapter are met, namely:

- (a) the transfer is necessary for the purposes set out in Article 1(1);
- (b) the personal data are transferred to a controller in a third country or international organisation that is an authority competent for the purposes referred to in Article 1(1);
- (c) where personal data are transmitted or made available from another Member State, that Member State has given its prior authorisation to the transfer in accordance with its national law;
- (d) the Commission has adopted an adequacy decision pursuant to Article 36, or, in the absence of such a decision, appropriate safeguards have been provided or exist pursuant to Article 37, or, in the absence of an adequacy decision pursuant to Article 36 and of appropriate safeguards in accordance with Article 37, derogations for specific situations apply pursuant to Article 38; and
- (e) in the case of an onward transfer to another third country or international organisation, the competent authority that carried out the original transfer or another competent authority of the same Member State authorises the onward transfer, after taking into due account all relevant factors, including the seriousness of the criminal offence, the purpose for which the personal data was originally transferred and the level of personal data protection in the third country or an international organisation to which personal data are onward transferred.

2. Member States shall provide for transfers without the prior authorisation by another Member State in accordance with point (c) of paragraph 1 to be permitted only if the transfer of the personal data is necessary for the prevention of an immediate and serious threat to public security of a Member State or a third country or to essential interests of a Member State and the prior authorisation cannot be obtained in good time. The authority responsible for giving prior authorisation shall be informed without delay.

3. All provisions in this Chapter shall be applied in order to ensure that the level of protection of natural persons ensured by this Directive is not undermined.

Transfers on the basis of an adequacy decision

1. Member States shall provide that a transfer of personal data to a third country or an

international organisation may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection. Such a transfer shall not require any specific authorisation.

2. When assessing the adequacy of the level of protection, the Commission shall, in particular, take account of the following elements:

- (a) the rule of law, respect for human rights and fundamental freedoms, relevant legislation, both general and sectoral, including concerning public security, defence, national security and criminal law and the access of public authorities to personal data, as well as the implementation of such legislation, data protection rules, professional rules and security measures, including rules for the onward transfer of personal data to another third country or international organisation, which are complied with in that country or international organisation, case-law, as well as effective and enforceable data subject rights and effective administrative and judicial redress for the data subjects whose personal data are transferred;
- (b) the existence and effective functioning of one or more independent supervisory authorities in the third country or to which an international organisation is subject, with responsibility for ensuring and enforcing compliance with data protection rules, including adequate enforcement powers, for assisting and advising data subjects in exercising their rights and for cooperation with the supervisory authorities of the Member States; and
- (c) the international commitments the third country or international organisation concerned has entered into, or other obligations arising from legally binding conventions or instruments as well as from its participation in multilateral or regional systems, in particular in relation to the protection of personal data.

3. The Commission, after assessing the adequacy of the level of protection, may decide, by means of implementing act, that a third country, a territory or one or more specified sectors within a third country, or an international organisation ensures an adequate level of protection within the meaning of paragraph 2 of this Article. The implementing act shall provide a mechanism for periodic review, at least every four years, which shall take into account all relevant developments in the third country or international organisation. The implementing act shall specify its territorial and sectoral application and, where applicable, identify the supervisory authority or authorities referred to in point (b) of paragraph 2 of this Article. The implementing act shall be adopted in accordance with the examination procedure referred to in Article 58(2).

4. The Commission shall, on an ongoing basis, monitor developments in third countries and international organisations that could affect the functioning of decisions adopted pursuant to paragraph 3.

5. The Commission shall, where available information reveals, in particular following the review referred to in paragraph 3 of this Article, that a third country, a territory or one or more specified sectors within a third country, or an international organisation no longer ensures an adequate level of protection within the meaning of paragraph 2 of this Article, to the extent necessary, repeal, amend or suspend the decision referred to in paragraph 3 of this Article by means of implementing acts without retro-active effect. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 58(2).

On duly justified imperative grounds of urgency, the Commission shall adopt immediately applicable implementing acts in accordance with the procedure referred to in Article 58(3).

6. The Commission shall enter into consultations with the third country or international organisation with a view to remedying the situation giving rise to the decision made pursuant to paragraph 5.

7. Member States shall provide for a decision pursuant to paragraph 5 to be without prejudice to transfers of personal data to the third country, the territory or one or more specified sectors within that third country, or the international organisation in question pursuant to Articles 37 and 38.

8. The Commission shall publish in the *Official Journal of the European Union* and on its website a list of the third countries, territories and specified sectors within a third country and international organisations for which it has decided that an adequate level of protection is or is no longer ensured.

Article 37

Transfers subject to appropriate safeguards

1. In the absence of a decision pursuant to Article 36(3), Member States shall provide that a transfer of personal data to a third country or an international organisation may take place where:

- (a) appropriate safeguards with regard to the protection of personal data are provided for in

- a legally binding instrument; or
 - (b) the controller has assessed all the circumstances surrounding the transfer of personal data and concludes that appropriate safeguards exist with regard to the protection of personal data.
2. The controller shall inform the supervisory authority about categories of transfers under point (b) of paragraph 1.
3. When a transfer is based on point (b) of paragraph 1, such a transfer shall be documented and the documentation shall be made available to the supervisory authority on request, including the date and time of the transfer, information about the receiving competent authority, the justification for the transfer and the personal data transferred.

Article 38

Derogations for specific situations

1. In the absence of an adequacy decision pursuant to Article 36, or of appropriate safeguards pursuant to Article 37, Member States shall provide that a transfer or a category of transfers of personal data to a third country or an international organisation may take place only on the condition that the transfer is necessary:
- (a) in order to protect the vital interests of the data subject or another person;
 - (b) to safeguard legitimate interests of the data subject, where the law of the Member State transferring the personal data so provides;
 - (c) for the prevention of an immediate and serious threat to public security of a Member State or a third country;
 - (d) in individual cases for the purposes set out in Article 1(1); or
 - (e) in an individual case for the establishment, exercise or defence of legal claims relating to the purposes set out in Article 1(1).
2. Personal data shall not be transferred if the transferring competent authority determines that fundamental rights and freedoms of the data subject concerned override the public interest in the transfer set out in points (d) and (e) of paragraph 1.
3. Where a transfer is based on paragraph 1, such a transfer shall be documented and the documentation shall be made available to the supervisory authority on request, including the date and time of the transfer, information about the receiving competent authority, the justification for the transfer and the personal data transferred.

Article 39

Transfers of personal data to recipients established in third countries

1. By way of derogation from point (b) of Article 35(1) and without prejudice to any international agreement referred to in paragraph 2 of this Article, Union or Member State law may provide for the competent authorities referred to in point (7)(a) of Article 3, in individual and specific cases, to transfer personal data directly to recipients established in third countries only if the other provisions of this Directive are complied with and all of the following conditions are fulfilled:
- (a) the transfer is strictly necessary for the performance of a task of the transferring competent authority as provided for by Union or Member State law for the purposes set out in Article 1(1);
 - (b) the transferring competent authority determines that no fundamental rights and freedoms of the data subject concerned override the public interest necessitating the transfer in the case at hand;
 - (c) the transferring competent authority considers that the transfer to an authority that is competent for the purposes referred to in Article 1(1) in the third country is ineffective or inappropriate, in particular because the transfer cannot be achieved in good time;
 - (d) the authority that is competent for the purposes referred to in Article 1(1) in the third country is informed without undue delay, unless this is ineffective or inappropriate;
 - (e) the transferring competent authority informs the recipient of the specified purpose or purposes for which the personal data are only to be processed by the latter provided that such processing is necessary.
2. An international agreement referred to in paragraph 1 shall be any bilateral or multilateral international agreement in force between Member States and third countries in the field of judicial cooperation in criminal matters and police cooperation.
3. The transferring competent authority shall inform the supervisory authority about transfers

under this Article.

4. Where a transfer is based on paragraph 1, such a transfer shall be documented.

Article 40

International cooperation for the protection of personal data

In relation to third countries and international organisations, the Commission and Member States shall take appropriate steps to:

- (a) develop international cooperation mechanisms to facilitate the effective enforcement of legislation for the protection of personal data;
- (b) provide international mutual assistance in the enforcement of legislation for the protection of personal data, including through notification, complaint referral, investigative assistance and information exchange, subject to appropriate safeguards for the protection of personal data and other fundamental rights and freedoms;
- (c) engage relevant stakeholders in discussion and activities aimed at furthering international cooperation in the enforcement of legislation for the protection of personal data;
- (d) promote the exchange and documentation of personal data protection legislation and practice, including on jurisdictional conflicts with third countries.

CHAPTER VI

Independent supervisory authorities

Section 1

Independent status

Article 41

Supervisory authority

1. Each Member State shall provide for one or more independent public authorities to be responsible for monitoring the application of this Directive, in order to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the Union ('supervisory authority').
2. Each supervisory authority shall contribute to the consistent application of this Directive throughout the Union. For that purpose, the supervisory authorities shall cooperate with each other and with the Commission in accordance with Chapter VII.
3. Member States may provide for a supervisory authority established under Regulation (EU) 2016/679 to be the supervisory authority referred to in this Directive and to assume responsibility for the tasks of the supervisory authority to be established under paragraph 1 of this Article.
4. Where more than one supervisory authority is established in a Member State, that Member State shall designate the supervisory authority which are to represent those authorities in the Board referred to in Article 51.

Article 42

Independence

1. Each Member State shall provide for each supervisory authority to act with complete independence in performing its tasks and exercising its powers in accordance with this Directive.
2. Member States shall provide for the member or members of their supervisory authorities in the performance of their tasks and exercise of their powers in accordance with this Directive, to remain free from external influence, whether direct or indirect, and that they shall neither seek nor take instructions from anybody.
3. Members of Member States' supervisory authorities shall refrain from any action incompatible with their duties and shall not, during their term of office, engage in any incompatible occupation, whether gainful or not.
4. Each Member State shall ensure that each supervisory authority is provided with the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers, including those to be carried out in the context of mutual assistance, cooperation and participation in the Board.
5. Each Member State shall ensure that each supervisory authority chooses and has its own staff which shall be subject to the exclusive direction of the member or members of the supervisory authority concerned.

6. Each Member State shall ensure that each supervisory authority is subject to financial control which does not affect its independence and that it has separate, public annual budgets, which may be part of the overall state or national budget.

Article 43

General conditions for the members of the supervisory authority

1. Member States shall provide for each member of their supervisory authorities to be appointed by means of a transparent procedure by:
 - their parliament;
 - their government;
 - their head of State; or
 - an independent body entrusted with the appointment under Member State law.
2. Each member shall have the qualifications, experience and skills, in particular in the area of the protection of personal data, required to perform their duties and exercise their powers.
3. The duties of a member shall end in the event of the expiry of the term of office, resignation or compulsory retirement, in accordance with the law of the Member State concerned.
4. A member shall be dismissed only in cases of serious misconduct or if the member no longer fulfils the conditions required for the performance of the duties.

Article 44

Rules on the establishment of the supervisory authority

1. Each Member State shall provide by law for all of the following:
 - (a) the establishment of each supervisory authority;
 - (b) the qualifications and eligibility conditions required to be appointed as a member of each supervisory authority;
 - (c) the rules and procedures for the appointment of the member or members of each supervisory authority;
 - (d) the duration of the term of the member or members of each supervisory authority of not less than four years, except for the first appointment after 6 May 2016, part of which may take place for a shorter period where that is necessary to protect the independence of the supervisory authority by means of a staggered appointment procedure;
 - (e) whether and, if so, for how many terms the member or members of each supervisory authority is eligible for reappointment;
 - (f) the conditions governing the obligations of the member or members and staff of each supervisory authority, prohibitions on actions, occupations and benefits incompatible therewith during and after the term of office and rules governing the cessation of employment.
2. The member or members and the staff of each supervisory authority shall, in accordance with Union or Member State law, be subject to a duty of professional secrecy both during and after their term of office, with regard to any confidential information which has come to their knowledge in the course of the performance of their tasks or the exercise of their powers. During their term of office, that duty of professional secrecy shall in particular apply to reporting by natural persons of infringements of this Directive.

Section 2

Competence, tasks and powers

Article 45

Competence

1. Each Member State shall provide for each supervisory authority to be competent for the performance of the tasks assigned to, and for the exercise of the powers conferred on, it in accordance with this Directive on the territory of its own Member State.
2. Each Member State shall provide for each supervisory authority not to be competent for the supervision of processing operations of courts when acting in their judicial capacity. Member States may provide for their supervisory authority not to be competent to supervise processing operations of other independent judicial authorities when acting in their judicial capacity.

Article 46

Tasks

1. Each Member State shall provide, on its territory, for each supervisory authority to:
 - (a) monitor and enforce the application of the provisions adopted pursuant to this Directive and its implementing measures;
 - (b) promote public awareness and understanding of the risks, rules, safeguards and rights in relation to processing;
 - (c) advise, in accordance with Member State law, the national parliament, the government and other institutions and bodies on legislative and administrative measures relating to the protection of natural persons' rights and freedoms with regard to processing;
 - (d) promote the awareness of controllers and processors of their obligations under this Directive;
 - (e) upon request, provide information to any data subject concerning the exercise of their rights under this Directive and, if appropriate, cooperate with the supervisory authorities in other Member States to that end;
 - (f) deal with complaints lodged by a data subject, or by a body, organisation or association in accordance with Article 55, and investigate, to the extent appropriate, the subject-matter of the complaint and inform the complainant of the progress and the outcome of the investigation within a reasonable period, in particular if further investigation or coordination with another supervisory authority is necessary;
 - (g) check the lawfulness of processing pursuant to Article 17, and inform the data subject within a reasonable period of the outcome of the check pursuant to paragraph 3 of that Article or of the reasons why the check has not been carried out;
 - (h) cooperate with, including by sharing information, and provide mutual assistance to other supervisory authorities, with a view to ensuring the consistency of application and enforcement of this Directive;
 - (i) conduct investigations on the application of this Directive, including on the basis of information received from another supervisory authority or other public authority;
 - (j) monitor relevant developments insofar as they have an impact on the protection of personal data, in particular the development of information and communication technologies;
 - (k) provide advice on the processing operations referred to in Article 28; and
 - (l) contribute to the activities of the Board.
2. Each supervisory authority shall facilitate the submission of complaints referred to in point (f) of paragraph 1 by measures such as providing a complaint submission form which can also be completed electronically, without excluding other means of communication.
3. The performance of the tasks of each supervisory authority shall be free of charge for the data subject and for the data protection officer.
4. Where a request is manifestly unfounded or excessive, in particular because it is repetitive, the supervisory authority may charge a reasonable fee based on its administrative costs, or may refuse to act on the request. The supervisory authority shall bear the burden of demonstrating that the request is manifestly unfounded or excessive.

Article 47

Powers

1. Each Member State shall provide by law for each supervisory authority to have effective investigative powers. Those powers shall include at least the power to obtain from the controller and the processor access to all personal data that are being processed and to all information necessary for the performance of its tasks.
2. Each Member State shall provide by law for each supervisory authority to have effective corrective powers such as, for example:
 - (a) to issue warnings to a controller or processor that intended processing operations are likely to infringe the provisions adopted pursuant to this Directive;
 - (b) to order the controller or processor to bring processing operations into compliance with the provisions adopted pursuant to this Directive, where appropriate, in a specified manner and within a specified period, in particular by ordering the rectification or erasure of personal data or restriction of processing pursuant to Article 16;
 - (c) to impose a temporary or definitive limitation, including a ban, on processing.

3. Each Member State shall provide by law for each supervisory authority to have effective advisory powers to advise the controller in accordance with the prior consultation procedure referred to in Article 28 and to issue, on its own initiative or on request, opinions to its national parliament and its government or, in accordance with its national law, to other institutions and bodies as well as to the public on any issue related to the protection of personal data.

4. The exercise of the powers conferred on the supervisory authority pursuant to this Article shall be subject to appropriate safeguards, including effective judicial remedy and due process, as set out in Union and Member State law in accordance with the Charter.

5. Each Member State shall provide by law for each supervisory authority to have the power to bring infringements of provisions adopted pursuant to this Directive to the attention of judicial authorities and, where appropriate, to commence or otherwise engage in legal proceedings, in order to enforce the provisions adopted pursuant to this Directive.

Article 48

Reporting of infringements

Member States shall provide for competent authorities to put in place effective mechanisms to encourage confidential reporting of infringements of this Directive.

Article 49

Activity reports

Each supervisory authority shall draw up an annual report on its activities, which may include a list of types of infringement notified and types of penalties imposed. Those reports shall be transmitted to the national parliament, the government and other authorities as designated by Member State law. They shall be made available to the public, the Commission and the Board.

CHAPTER VII

Cooperation

Article 50

Mutual assistance

1. Each Member State shall provide for their supervisory authorities to provide each other with relevant information and mutual assistance in order to implement and apply this Directive in a consistent manner, and to put in place measures for effective cooperation with one another. Mutual assistance shall cover, in particular, information requests and supervisory measures, such as requests to carry out consultations, inspections and investigations.

2. Each Member States shall provide for each supervisory authority to take all appropriate measures required to reply to a request of another supervisory authority without undue delay and no later than one month after receiving the request. Such measures may include, in particular, the transmission of relevant information on the conduct of an investigation.

3. Requests for assistance shall contain all the necessary information, including the purpose of and reasons for the request. Information exchanged shall be used only for the purpose for which it was requested.

4. The requested supervisory authority shall not refuse to comply with the request unless:

- (a) it is not competent for the subject-matter of the request or for the measures it is requested to execute; or
- (b) compliance with the request would infringe this Directive or Union or Member State law to which the supervisory authority receiving the request is subject.

5. The requested supervisory authority shall inform the requesting supervisory authority of the results or, as the case may be, of the progress of the measures taken in order to respond to the request. The requested supervisory authority shall provide reasons for any refusal to comply with a request pursuant to paragraph 4.

6. Requested supervisory authorities shall, as a rule, supply the information requested by other supervisory authorities by electronic means, using a standardised format.

7. Requested supervisory authorities shall not charge a fee for any action taken by them pursuant to a request for mutual assistance. Supervisory authorities may agree on rules to indemnify each other for specific expenditure arising from the provision of mutual assistance in exceptional circumstances.

8. The Commission may, by means of implementing acts, specify the format and procedures for mutual assistance referred to in this Article and the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the Board. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 58(2).

Tasks of the Board

1. The Board established by Regulation (EU) 2016/679 shall perform all of the following tasks in relation to processing within the scope of this Directive:

- (a) advise the Commission on any issue related to the protection of personal data in the Union, including on any proposed amendment of this Directive;
- (b) examine, on its own initiative, on request of one of its members or on request of the Commission, any question covering the application of this Directive and issue guidelines, recommendations and best practices in order to encourage consistent application of this Directive;
- (c) draw up guidelines for supervisory authorities concerning the application of measures referred to in Article 47(1) and (3);
- (d) issue guidelines, recommendations and best practices in accordance with point (b) of this subparagraph for establishing personal data breaches and determining the undue delay referred to in Article 30(1) and (2) and for the particular circumstances in which a controller or a processor is required to notify the personal data breach;
- (e) issue guidelines, recommendations and best practices in accordance with point (b) of this subparagraph as to the circumstances in which a personal data breach is likely to result in a high risk to the rights and freedoms of natural persons as referred to in Article 31(1);
- (f) review the practical application of the guidelines, recommendations and best practices referred to in points (b) and (c);
- (g) provide the Commission with an opinion for the assessment of the adequacy of the level of protection in a third country, a territory or one or more specified sectors within a third country, or an international organisation, including for the assessment whether such a third country, territory, specified sector, or international organisation no longer ensures an adequate level of protection;
- (h) promote the cooperation and the effective bilateral and multilateral exchange of information and best practices between the supervisory authorities;
- (i) promote common training programmes and facilitate personnel exchanges between the supervisory authorities and, where appropriate, with the supervisory authorities of third countries or with international organisations;
- (j) promote the exchange of knowledge and documentation on data protection law and practice with data protection supervisory authorities worldwide.

With regard to point (g) of the first subparagraph, the Commission shall provide the Board with all necessary documentation, including correspondence with the government of the third country, with the territory or specified sector within that third country, or with the international organisation.

2. Where the Commission requests advice from the Board, it may indicate a time limit, taking into account the urgency of the matter.

3. The Board shall forward its opinions, guidelines, recommendations and best practices to the Commission and to the committee referred to in Article 58(1) and make them public.

4. The Commission shall inform the Board of the action it has taken following opinions, guidelines, recommendations and best practices issued by the Board.

CHAPTER VIII

Remedies, liability and penalties

Right to lodge a complaint with a supervisory authority

1. Without prejudice to any other administrative or judicial remedy, Member States shall provide for every data subject to have the right to lodge a complaint with a single supervisory authority, if the data subject considers that the processing of personal data relating to him or her infringes provisions adopted pursuant to this Directive.

2. Member States shall provide for the supervisory authority with which the complaint has been lodged to transmit it to the competent supervisory authority, without undue delay if the complaint is not lodged with the supervisory authority that is competent pursuant to Article 45(1). The data subject shall be informed about the transmission.

3. Member States shall provide for the supervisory authority with which the complaint has been lodged to provide further assistance on request of the data subject.

4. The data subject shall be informed by the competent supervisory authority of the progress and the outcome of the complaint, including of the possibility of a judicial remedy pursuant to Article 53.

Article 53

Right to an effective judicial remedy against a supervisory authority

1. Without prejudice to any other administrative or non-judicial remedy, Member States shall provide for the right of a natural or legal person to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them.
2. Without prejudice to any other administrative or non-judicial remedy, each data subject shall have the right to an effective judicial remedy where the supervisory authority which is competent pursuant to Article 45(1) does not handle a complaint or does not inform the data subject within three months of the progress or outcome of the complaint lodged pursuant to Article 52.
3. Member States shall provide for proceedings against a supervisory authority to be brought before the courts of the Member State where the supervisory authority is established.

Article 54

Right to an effective judicial remedy against a controller or processor

Without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority pursuant to Article 52, Member States shall provide for the right of a data subject to an effective judicial remedy where he or she considers that his or her rights laid down in provisions adopted pursuant to this Directive have been infringed as a result of the processing of his or her personal data in non-compliance with those provisions.

Article 55

Representation of data subjects

Member States shall, in accordance with Member State procedural law, provide for the data subject to have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with Member State law, has statutory objectives which are in the public interest and is active in the field of protection of data subject's rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf and to exercise the rights referred to in Articles 52, 53 and 54 on his or her behalf.

Article 56

Right to compensation

Member States shall provide for any person who has suffered material or non-material damage as a result of an unlawful processing operation or of any act infringing national provisions adopted pursuant to this Directive to have the right to receive compensation for the damage suffered from the controller or any other authority competent under Member State law.

Article 57

Penalties

Member States shall lay down the rules on penalties applicable to infringements of the provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.

CHAPTER IX

Implementing acts

Article 58

Committee procedure

1. The Commission shall be assisted by the committee established by Article 93 of Regulation (EU) 2016/679. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.
3. Where reference is made to this paragraph, Article 8 of Regulation (EU) No 182/2011, in conjunction with Article 5 thereof, shall apply.

CHAPTER X
Final provisions

Article 59

Repeal of Framework Decision 2008/977/JHA

1. Framework Decision 2008/977/JHA is repealed with effect from 6 May 2018.
2. References to the repealed Decision referred to in paragraph 1 shall be construed as references to this Directive.

Article 60

Union legal acts already in force

The specific provisions for the protection of personal data in Union legal acts that entered into force on or before 6 May 2016 in the field of judicial cooperation in criminal matters and police cooperation, which regulate processing between Member States and the access of designated authorities of Member States to information systems established pursuant to the Treaties within the scope of this Directive, shall remain unaffected.

Article 61

Relationship with previously concluded international agreements in the field of judicial cooperation in criminal matters and police cooperation

International agreements involving the transfer of personal data to third countries or international organisations which were concluded by Member States prior to 6 May 2016 and which comply with Union law as applicable prior to that date shall remain in force until amended, replaced or revoked.

Article 62

Commission reports

1. By 6 May 2022, and every four years thereafter, the Commission shall submit a report on the evaluation and review of this Directive to the European Parliament and to the Council. The reports shall be made public.
2. In the context of the evaluations and reviews referred to in paragraph 1, the Commission shall examine, in particular, the application and functioning of Chapter V on the transfer of personal data to third countries or international organisations with particular regard to decisions adopted pursuant to Article 36(3) and Article 39.
3. For the purposes of paragraphs 1 and 2, the Commission may request information from Member States and supervisory authorities.
4. In carrying out the evaluations and reviews referred to in paragraphs 1 and 2, the Commission shall take into account the positions and findings of the European Parliament, of the Council and of other relevant bodies or sources.
5. The Commission shall, if necessary, submit appropriate proposals with a view to amending this Directive, in particular taking account of developments in information technology and in the light of the state of progress in the information society.
6. By 6 May 2019, the Commission shall review other legal acts adopted by the Union which regulate processing by the competent authorities for the purposes set out in Article 1(1) including those referred to in Article 60, in order to assess the need to align them with this Directive and to make, where appropriate, the necessary proposals to amend those acts to ensure a consistent approach to the protection of personal data within the scope of this Directive.

Article 63

Transposition

1. Member States shall adopt and publish, by 6 May 2018, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith notify to the Commission the text of those provisions. They shall apply those provisions from 6 May 2018.

When Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. By way of derogation from paragraph 1, a Member State may provide, exceptionally, where it involves disproportionate effort, for automated processing systems set up before 6 May 2016 to be brought into conformity with Article 25(1) by 6 May 2023.
3. By way of derogation from paragraphs 1 and 2 of this Article, a Member State may, in

exceptional circumstances, bring an automated processing system as referred to in paragraph 2 of this Article into conformity with Article 25(1) within a specified period after the period referred to in paragraph 2 of this Article, if it would otherwise cause serious difficulties for the operation of that particular automated processing system. The Member State concerned shall notify the Commission of the grounds for those serious difficulties and the grounds for the specified period within which it shall bring that particular automated processing system into conformity with Article 25(1). The specified period shall in any event not be later than 6 May 2026.

4. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 64

Entry into force

This Directive shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Article 65

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 27 April 2016.

For the European Parliament

The President

M. SCHULZ

For the Council

The President

J.A. HENNIS-PLASSCHAERT

⁽¹⁾ OJ C 391, 18.12.2012, p. 127.

⁽²⁾ Position of the European Parliament of 12 March 2014 (not yet published in the Official Journal) and position of the Council at first reading of 8 April 2016 (not yet published in the Official Journal). Position of the European Parliament of 14 April 2016.

⁽³⁾ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

⁽⁴⁾ Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (OJ L 350, 30.12.2008, p. 60).

⁽⁵⁾ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) (see page 1 of this Official Journal).

⁽⁶⁾ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

⁽⁷⁾ Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare (OJ L 88, 4.4.2011, p. 45).

⁽⁸⁾ Council Common Position 2005/69/JHA of 24 January 2005 on exchanging certain data with Interpol (OJ L 27, 29.1.2005, p. 61).

⁽⁹⁾ Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ L 205, 7.8.2007, p. 63).

⁽¹⁰⁾ Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ L 78, 26.3.1977, p. 17).

⁽¹¹⁾ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

⁽¹²⁾ Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ L 210, 6.8.2008, p. 1).

⁽¹³⁾ Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 197, 12.7.2000, p. 1).

⁽¹⁴⁾ Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ L 335, 17.12.2011, p. 1).

⁽¹⁵⁾ OJ L 176, 10.7.1999, p. 36.

⁽¹⁶⁾ OJ L 53, 27.2.2008, p. 52.

⁽¹⁷⁾ OJ L 160, 18.6.2011, p. 21.

⁽¹⁸⁾ OJ C 192, 30.6.2012, p. 7.

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Ellison Review – Walton, Lambert and Black

An investigation into the circumstances surrounding a meeting between A/Detective Inspector Richard Walton and an undercover officer on 14 August 1998

Independent investigation report

Investigation information

Investigation name:	Walton, Lambert and Black
IPCC reference:	2014/023874

IPCC office:	Birmingham
Lead investigator:	Steve Bimson
Case supervisor:	
Commission delegate:	Sarah Green, Deputy Chair

Status of report:	Finalised
Date finalised:	14 January 2016

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Introduction

The purpose of this report

1. I was appointed by the IPCC to carry out an independent investigation into the circumstances of a meeting between Acting Detective Inspector Richard Walton and an undercover officer on 14 August 1998.
2. This is my report for the Commission. It summarises and evaluates the evidence, refers to relevant documents and where necessary makes factual findings. In its conclusions the lead investigator will:
 - give my opinion about whether the subjects of the investigation have a case to answer for misconduct or gross misconduct, or no case to answer.
 - identify for the Commission whether the performance of any subject of the investigation may have fallen below the standard expected of them
 - identify for the Commission any lessons which may need to be learned by any organisation related to the investigation and any recommendations which it may wish to make in consequence.
 - provide the Commission with sufficient information, and if appropriate express a view about whether it should refer any subject of the investigation to the CPS.
3. On receipt of this report, the Commission will send it to the Metropolitan Police Service as appropriate authority which must then advise the IPCC what action it will take in response to it. If the IPCC does not agree with the Metropolitan Police Service, it may make recommendations and ultimately directions about what action to take. The Commission will also decide whether to make a referral to the Crown Prosecution Service (CPS).

Background information about the Ellison Review

4. Stephen Lawrence was murdered on the evening of 22 April 1993. The circumstances of the murder and the subsequent police investigation were reviewed by the Macpherson Inquiry, which reported in 1999.
5. In 2012 the Home Secretary established an Independent Review, to be undertaken by Mark Ellison QC (The Ellison Review), amongst the Terms of Reference for the Ellison Review was:

‘What was the role of undercover policing in the Lawrence case, who ordered it

and why? Was information on the involvement of undercover police withheld from the Macpherson Inquiry, and if it had been made available what impact might that have had on the Inquiry’

6. The Ellison Review identified that a meeting had taken place on 14 August 1998, between an undercover officer and Acting Detective Inspector Richard Walton. Richard Walton was, at the time, working on the Metropolitan Police Service (MPS) Lawrence Review Team and was involved in the preparations of the MPS final submission to the Macpherson Inquiry.
7. The Ellison Review, published in March 2014, made a number of findings in respect of this meeting, and the MPS referred the conduct of officers involved to the Independent Police Complaints Commission on 07 April 2014. The matter was declared subject of an IPCC Independent Investigation on 22 May 2014

The investigation

Terms of reference

8. The terms of reference for this investigation were initially approved by IPCC Deputy Chair, Sarah Green, on 13 June 2014. The terms of reference were amended and approved on 15 September 2014. The terms of reference specific to this investigation are:
 1. To investigate
 - a) The actions and intentions of Mr Lambert and Mr Black in arranging a meeting between Acting Detective Inspector Richard Walton, from the MPS Lawrence Review Team, and an undercover officer deployed close to the Lawrence family in August 1998.
 - b) The actions and intention of Mr Walton in attending a meeting with an undercover officer deployed close to the Lawrence family in August 1998.
 - c) What other senior officers, if any, were involved in sanctioning the meeting and their reasons for doing so.
 - d) What information was obtained by Mr Walton and how this was used to influence the MPS final submission to the Stephen Lawrence Inquiry.
 - e) What information was provided by Commander Richard Walton during interview to the Review (The Ellison Review) in October 2013, and the reasons for any discrepancies in his evidence when interviewed in February 2014.
 2. To identify whether any subject of the investigation may have committed a criminal offence and, if appropriate, make early contact with the Director of Public Prosecutions (DPP). On receipt of the final report, the Commission shall determine whether the report should be sent to the DPP.

3. To identify whether any subject of the investigation, in the investigator's opinion, has a case to answer for misconduct or gross misconduct, or no case to answer.
4. To consider and report on whether there is organisational learning, including:
 - whether any change in policy or practice would help to prevent a recurrence of the event, incident or conduct investigated;
 - whether the incident highlights any good practice that should be shared.
9. Following consultation with Interested Parties, an amendment to the terms of reference was made on 15 September 2014 as follows:

1(c) was amended to:

What other senior officers, if any, knew about or were involved in sanctioning the meeting and what were the reasons and circumstances for this.

Subjects of the investigation

10. The appropriate authority referred this investigation to the IPCC because in their opinion there was an indication that the police officers listed below may have:
 - (a) committed a criminal offence, or
 - (b) behaved in a manner which would justify the bringing of disciplinary proceedings
11. Any police officer whose conduct is under investigation is categorised as a subject of the investigation. A notice of investigation must be served on all subjects, informing them of the allegations against them.
12. They must also be informed of the severity of the allegations. In other words whether if proven they would amount to misconduct or gross misconduct.
13. The following people have been categorised as subjects of this investigation:

Name	Role	Severity	Date notified	Interviewed
Richard Walton	Commander	Gross Misconduct	30 July 2014	19 December 2014
Colin Black	Ex-Chief Superintendent MPS Special	Gross Misconduct	12 August 2014	18 December 2014

	Branch			
Robert Lambert	Ex-Detective Inspector, Special Demonstration Squad, MPS Special Branch	Gross Misconduct	11 August 2014	16 December 2014
N35	Ex-Detective Superintendent MPS Special Branch	Gross Misconduct	12 May 2015	04 June 2015
N34	Ex-Detective Chief Inspector, Special Demonstration Squad, MPS Special Branch	Gross Misconduct	14 May 2015	24 September 2015

Policies, procedures and legislation considered

14. The Standards of Professional Behaviour were examined in relation to this incident, in order to ascertain whether they were complied with. The Standards for the two dates of this incident were examined, those in place at the time of the meeting in 1998 and those in place when Richard Walton was interviewed by the Ellison Review. The details of the standards are as follows.

15. The Police (Discipline) Regulations 1985.

D203

Regulation 4(1), Schedule 1, sets out the Discipline Code, which identifies Discreditable Conduct as:

'...offence is committed where a member of a police force acts in a disorderly manner or any manner prejudicial to discipline or reasonably likely to bring discredit on the reputation of the force or of the police service'.

D202

16. The Police (Conduct) Regulations 2012

Regulation 3, Schedule 2, sets out the Standards of Professional Behaviour. It identifies:

Honesty and Integrity as:

'Police officers are honest, act with integrity and do no compromise or abuse their position'.

Discreditable Conduct as:

'Police officers behave in a manner which does not discredit the police service or undermine public confidence in it, whether on or off duty'.

Summary of the evidence

17. During this investigation a volume of evidence was gathered. After thorough analysis of all the evidence, I have selected the evidence I think is relevant and answers the terms of reference for my investigation. As such, not all the evidence gathered in the investigation is referred to in this report.

The details of people referred to in this report are included in the attached appendices.

Information from Ellison Review

- D11 18. The Ellison Review reported in March 2014. This review had a wide remit of reporting on 'Possible corruption and the role of undercover policing in the Stephen Lawrence case'. As part of the review, evidence was taken from N37, a police officer who had worked as an undercover officer and who provided evidence that his tasking was to obtain information to 'smear' the Lawrence family campaign.
19. N37 was, at the time of his deployment, part of the Metropolitan Police Service Special Demonstration Squad (SDS). He was among a number of ex-SDS officers who were interviewed by the review, evidencing their role in the management of undercover officers and as frontline undercover officers.
20. One of those officers, N81, provided evidence to the review on the tasking that they were working towards. The Ellison Review stated;
- 'We are satisfied that N81's undercover deployment was consequent upon the primary 'public order' remit of SDS's work. Like other deployments in the squad, it was a case of devising a means of entry to a group with potential for fomenting or participating in public disorder; and an organic deployment thereafter, including, where appropriate, moving from one group to another.*
- N81 was well-placed in one of the groups that associated itself with, and tried to build relations with, both the Lawrence family and other groups during the Public Inquiry. N81 is adamant that there was no tasking at any stage into the Stephen Lawrence family campaign, but it is clear to us that N81's reporting nevertheless touched on the Lawrence family and its campaign'.*
21. The Ellison Review goes on to make a finding in relation to the work of N81 and their deployment as follows (p-227):
- 'The fact that the SDS had an undercover deployment in a group that got close to the Lawrence family campaign, at the centre of which was a family grieving over a murdered son and alleging inadequacy in the MPS response to that murder at a contentious Public Inquiry, should, in our assessment, have raised concerns in the SDS management and led to a careful consideration of:*
- *Whether it was proportionate and appropriate for that undercover deployment to continue whilst the Public Inquiry was in progress; and*

- *Whether those dealing with the Public Inquiry on behalf of the MPS should be informed of the situation, with a view to giving advice as to whether any disclosure might be required to the Inquiry Chairman.*

It does not appear that any such consideration was given to these factors by the SDS management'.

- D172 22. During the course of the work of the Ellison Review, a file note was uncovered, dated 18 August 1998, which referred to a meeting having taken place on 14 August 1998, between N81 and Acting Detective Inspector Richard Walton. Detective Inspector Robert Lambert, a member of the management team within SDS, was also present and produced the file note.
23. The key parts of this file note are as follows:
- 'It was a fascinating and valuable exchange of information concerning an issue which, according to DI Walton, continues to dominate the Commissioner's agenda on a daily basis.'*
- 'An in-depth discussion enabled him to increase his understanding of the Lawrence's relationship with the various campaign groups.....this, he said, would be of great value as he continued to prepare a draft submission to the Inquiry on behalf of the Commissioner'.*
- 'DI Walton explained the three main areas that his team is addressing;*
- 1. How to respond to the charge of institutionalised racism....*
 - 2. How to handle the second stage of the Public Enquiry....*
 - 3. How to regain the confidence of the black community..'*
24. The note bears the name of DI Lambert, and is dated 18.8.98, it is circulated to detective sergeants within the SDS, it is seen and minuted by Detective Chief Inspector N34:
- 'An excellent meeting and a good example of the strides N81 has made over the last 12 months'.*
- D157 25. The Ellison Review reports that this file note was found with other SDS Operational Strategy Reports from 1998/1999. The file note formed part of one report prepared in early September 1998 by DCI N34. The Strategy Report makes reference to the meeting between N81 and DI Walton:
- '...N81's unique insight into the behind the scenes machinations of the Lawrence campaign has also proved invaluable to A/DI Walton who is currently attached to the Stephen Lawrence review team. At a recent SDS meeting, N81 was able to give A/DI Walton a first-hand briefing on the case and offer some sound advice....'*
- '...regular reporting to C squad and additional discreet briefings to A/DI Walton when necessary.'*
26. This document was minuted by Detective Superintendent N35 and then passed to Special Branch Operations Commander Colin Black, who provided a minute dated 14 September 1998, as follows;
- 'Thank you. These papers confirm that SDS is, as usual, well positioned at the focal crisis points of policing in London. I am aware that (DI Walton) of CO24*

receives ad hoc off-the-record briefings from SDS. I reiterated to him that it is essential that knowledge of this operation goes no further. Would not wish him to receive anything on paper.....'

27. The Ellison Review explored how the meeting between N81 and A/DI Walton came about and who requested it. DI Lambert stated in his response to potential criticism in the draft Ellison Review report, that this meeting had been arranged at the request of his senior management within SDS, the request had come to Commander Special Branch and was delegated down to him. The purpose was for A/DI Walton to be in a position to brief the Commissioner. On that basis DI Lambert felt he could not be criticised.
- S2a 28. Operation Herne interviewed N81 in August 2013 in which N81 described the meeting taking place, but stated that N81 believed that A/DI Walton was an official from the Home Office. N81 describes the content of the meeting as follows:
- 'The official asked me generic questions about the campaign such as the mood on the streets and the impact of (N81's group) around the Stephen Lawrence inquiry, the black community and the churches.'*
29. When interviewed by the Ellison Review, N81 described the meeting as very unusual, and when read the contents of the file note created by DI Lambert, N81 described the note as being true, *'but N81 no longer had a clear recollection of all that was discussed'*.
- S2 30. An interview with N81 was sought during the course of this IPCC investigation. Eventually an agreement was reached that N81 would respond to a series of questions provided by the IPCC.
31. N81 stated that N81's memory of the meeting with Richard Walton was very poor. It was unusual in that N81 did not meet many people outside of the SDS in these circumstances. However, N81 also stated that N81 was not concerned about the meeting and considered it to be completely valid.
32. N81 could not recall how long before the meeting N81 had had the request to attend, but thought it was not more than a week. N81 believed that it was Robert Lambert who made the request to N81. N81 cannot now recall the purpose that was given for the meeting.
33. N81 recalled the meeting was at Robert Lambert's house and that there was no-one else at the meeting other than Richard Walton, Robert Lambert and N81. N81 stated that N81 told Operation Herne that N81 believed that Richard Walton was an official from the Home Office. This was N81's perception.
34. They talked about 'policy stuff' that had little to do with N81's day-to-day role as an undercover officer. N81 had a very faint memory that N81 was asked to give N81's view on what the police could do to improve its relationship with the black community. N81 recollected talking about the 'black churches' because N81's group was making efforts to infiltrate black church groups.
35. N81 could not recall if N81 was told that Richard Walton was preparing a submission to the Lawrence Inquiry. N81's perception of the meeting now was that they discussed the troubled police relationship with the black community. Any discussion about the Lawrence's would have been in terms of the effect of

the Inquiry on the police and community relationships.

36. N81 emphasised that N81 was not targeting the Lawrence family and N81 did not have any facts relating to the inner plans of the Lawrence campaign. N81's recollection of the meeting was about police relationships with the black community, it was not about N81's undercover role.
37. N81 could not recollect any information provided to N81 by Richard Walton. N81 said that the flow of information was from N81, giving N81's perspective, to Richard Walton, rather than an exchange of views. This was the only occasion N81 met Richard Walton.
38. [REDACTED], Head of Special Branch at the time of the Inquiry stated that he had no knowledge of the meeting having taken place – his permission was not sought and he would not have given it if asked. He would have taken this matter to his manager Assistant Commissioner Veness.
- D172 39. A/DI Walton is now Commander Richard Walton, still a serving officer within MPS as the Head of Counter Terrorism. He was interviewed by the Ellison Review in October 2013. Prior to this interview the file note prepared by Robert Lambert which detailed the meeting between Richard Walton and N81 was disclosed to Richard Walton. Richard Walton described a conversation that he had had with Colin Black, his recollection had been assisted by the documents disclosed to him. He described this conversation as taking place in 1998, either in person or on the phone and a discussion about ensuring intelligence from SDS was passed on, he describes Colin Black as saying:
- 'We need a conduit to ensure that anything we pick, particularly from SDS, can be fed in to support your reinvestigations of Lawrence, of [REDACTED] and [REDACTED]...We need to be absolutely certain that John Grieve got the whole story and the whole picture. And as you know Richard, we have got good coverage'.*
40. Richard Walton stated that he could not recall the meeting with N81 when first questioned about it by Operation Herne, but again the disclosure had reminded him of some of the detail. He goes on to say:
- '...I did attend, I don't think I knew it was Bob Lambert's personal address... but anyway, it was an address in [REDACTED]...I think it was a Sunday, and of course, I knew Bob Lambert because of my six years in Special Branch...so this would have been Colin Black, I am presuming would have talked to Bob Lambert...so Bob knew me, I knew him, so he called me up. I don't know how the meeting came about. I can't recall the detail. I remember seeing an individual that Bob Lambert introduced me to, but I can't visualise that person.'*
41. Richard Walton was questioned about the arrangements for the meeting and asked whose idea it was to go and see this undercover officer, he states:
- 'I can't remember who exactly...but I think it might have come from their end, I think it may have been that I bumped into Bob at some stage...Yes as I say it is a long time ago, but I think it might have been a chance meeting with Bob Lambert where he would have said something like, "Well if it helps, do you want to...would it help to meet the actual operative in the field?", I think it might be that. I think I said "yes Bob, that would help because it would allow me to contextualise what is actually going on out there because we are getting all sorts of feeds and to speak to a person actually in the field would probably be as good*

as it gets”.

42. Richard Walton goes on to describe how helpful the disclosed document had been in assisting his recollection. He states;

‘I don’t really dispute anything around that. In fact it prompts a lot about me meeting this individual. It is pretty much as I recall it, but only having been prompted by it...’

He is questioned about the value of the meeting and agrees as follows:

‘...the reporting here talks about great value and all the rest of it... I don’t really dispute that. I suppose it is a fraction strong from my recollection, but I remember the meeting being helpful, particularly around (N81’s group and another group) because there were genuine concerns around them...’

43. The questioning of Richard Walton continues to try to identify the reasons behind his attendance at the meeting. It is suggested to Richard Walton, that the remit of the SDS is around Public Order considerations, yet his remit is to do with the Stephen Lawrence Review Team, which did not have a public order remit. Richard Walton broadens this out to community tension concerns, but then points out that the timing of the meeting is important as he felt the meeting would have been of more benefit to him moving to a role in CO24, rather than any role he may have had within the Lawrence Review Team. There was extensive discussion about the role that Richard Walton was in at the time. Richard Walton suggests that it was at the end of his time on the Stephen Lawrence Review Team (SLRT) and that he was ‘transitioning’ into his CO24 role. CO24 was the newly formed Racial and Violent Crime Task Force. It was established during the summer months of 1998. Richard Walton did eventually transfer to CO24.
44. In terms of the reason for the meeting, Richard Walton states:
- “....I think it was legitimate to see that individual to give some context, and to actually, probably some reassurance that it wasn’t worse than we thought...”*
45. Questioned about the Lambert file note, Richard Walton agrees with the content, and in particular the points raised as 1,2,3 – How to respond to institutionalised racism, the second stage of the public inquiry and how to regain the confidence of the black community – “ *...that is all correct. That would have come from me, because, of course, as I said, the thrust of my Lawrence Review Team role was absolutely those things.*”
46. It was put to him that the note suggests he is still doing the submission and he replies:
- “Yes,. That is the submission that I’m referring to, yes. That is the only thing that I wrote. That is fine...in terms of the file note, I don’t dispute any of that....”*
47. The discussion then moved to some of the intelligence that had been gathered by undercover officers, including some personal information about Doreen (now Baroness) and Neville Lawrence. Whilst Richard Walton could not recall seeing this information, he described that it would now be considered to be collateral intrusion, “*...which is something that we are aware of now, perhaps more than we were then I guess...*”
48. Mr Ellison pointed out:

“..you had the ability to shape your own presentation with the benefit of that intelligence..”

Which meant that the MPS could present themselves in a particular way, without others, including the Inquiry, knowing about how they arrived at that position.

49. Richard Walton was then informed of the potential criticism to be made of him in the Ellison Review report and he provided a written response to that potential criticism. He made the following points:
- He had been a uniformed sergeant at the time of his work on the SLRT and was not promoted to DI until March 1999.
 - That he recalled speaking with DI Lambert in August 1998, he thought in the lift lobby at New Scotland Yard, and that DI Lambert having heard that he had been working in the SLRT suggested it would be helpful for him to meet an undercover officer who could shed light on the race issue emanating from the Lawrence investigation and Inquiry. Richard Walton had complied with this request, but had never seen the note of the meeting until his first interview.
 - Richard Walton now said that the note *“..was a mixture of truths and half-truths..... The word I would use about the record is perhaps embellished...”*
 - That he had done no further work on the MPS submission once he had moved to CO24. The submission was presented to the Inquiry on 18 September 1998, but had been finished some weeks prior to that.
 - Richard Walton had had only one oral briefing and saw no other written material from SDS officers.
 - He had never seen any intelligence regarding personal and tactical information about the Lawrence family and no information of this nature was provided to him during the meeting.
 - He recalled meeting with Commander Black during September 1998, when he had already started on CO24 (Racial and Violent Crime Task Force)
 - He has little awareness of the correspondence route set up by Commander Black.
 - He felt he had no responsibility to disclose the presence of the undercover officer in a group close to and interacting with the Lawrence family, as he had no role in SO12 or Special Operations at that time.
50. Richard Walton was provided with another opportunity to be interviewed by the Ellison Review, and this took place on 03 February 2014. The Ellison Review report describes the significant points from this re-interview as follows:
- Richard Walton stated that he had never been an A/DI on the SLRT so from this felt he must have part of CO24.
 - He now believed that he had started or was just about to start on CO24. He felt it was improbable that he was on the SLRT when he met the undercover officer.
 - The team that had drawn up the final submissions was separate to the presenting side and so was not involved in any of the tactical decisions made in relation to this. Richard Walton felt it was more legitimate to see the

undercover officer as part of the new team (CO24). *“There was a legitimacy to the meeting that there wouldn’t have been if he had been part of the Lawrence Review Team.”*

- He had gone to meet an undercover officer with ‘awareness’ of the race hate scene in London. He did not know that the officer had coverage of the Lawrence family. *‘He would not have gone to the meeting if he had thought that’.*
 - His meeting with the undercover officer was part of his CO24 role.
 - He did not know what documents would evidence his move to CO24 and the exact date.
 - Richard Walton said that the Ellison Review could not show that he was working on the MPS submissions at that time or that he had received any personal information about the Lawrence’s at the meeting.
 - He could not remember speaking with any senior officer prior to the meeting or after it.
 - There were inaccuracies in the file note, there was no mention of the Lawrence family at the meeting, he had not told anyone at the meeting what his role was.
51. Deputy Assistant Commissioner John Grieve was also interviewed by the Ellison Review with a view to establishing a timeline as to when Richard Walton made the transition from SRT to CO24. Mr Grieve was able to say that Richard Walton was not working for him at the time of the meeting in August 1998, but he may have been later. Mr Grieve provided no information on any knowledge of the meeting taking place, but since Richard Walton was not working to him at the time of the meeting, then no knowledge would be expected.
52. Mr Ellison interviewed Lord Condon, MPS Commissioner at the time of this meeting taking place, and there is no suggestion that Lord Condon had any knowledge of this meeting taking place or any information that came from that meeting. Lord Condon stated *‘There can be no justification for anything which is a sort of them and us tactical advantage over the Lawrence’s in any way’.*
53. Lord Stevens, who was Deputy Commissioner at the time of the meeting, was also interviewed by the Ellison Review. In response to the description of the meeting taking place, Lord Stevens replies *‘It is totally unacceptable...’*. Mr Ellison describes that some of the information passed back was of a personal nature about the Lawrence’s and tactics and Lord Stevens further stated *‘No, I would find that incredible and I would find that unacceptable in any circumstances, to be frank’.*

Relevant findings from the Ellison Review

54. The Ellison Review report made a number of findings which are relevant to this investigation:
- *“...for a meeting to then be arranged to enable an in-depth discussion to take place about the Lawrence’s’ relationship with groups, seeking to support their campaign, in order to help inform the MPS submission to the Public Inquiry, was, in our assessment, a completely improper use of the*

knowledge the MPS had gained by the deployment of this officer.”

- *“The meeting was apparently sanctioned at a high level of SDS management. Mr Lambert has claimed that he was asked to arrange it by senior management within the SDS. We also note that a file note he made was sent to the Detective Chief Inspector acting at the time. From a later file note that he made in September 1998, it would also appear that Special Branch Operations Commander was aware of the meeting.”*
- *“In so far as we can discern, it appears , therefore, that the SDS management thought that it was a good idea to have the meeting because it might be useful to the MPS in dealing with the Inquiry, and because it might fulfil part of the ‘wider remit’ that the SDS was seeking to serve at this time.”*
- *“Nobody seems to have considered how opening such a channel of communication would be viewed by the Inquiry or the public, if it became known, in the context, of the MPS’ opposition to the Lawrence family case at the Public Enquiry”*

55. The Ellison Review summarises Richard Walton’s position in respect of the meeting with N81 as ‘..less than straightforward to establish and somewhat troubling’. The Review then identified a number of areas where Richard Walton’s answers caused concern:

- In October 2013, Walton largely signed up to the accuracy of the SDS documents created close to the time of the meeting. Producing narrative answers to questions such as ‘How did the meeting come about?’ He provided detailed answers on how the meeting with N81 was relevant to his work on the SLRT and the justification on a public order basis.
- After notification of potential criticism, Walton was interviewed again in February 2014. He said that what he had said in October 2013 had been wrong, he had tried to be helpful and had accepted the accuracy of the notes that he had been presented with, but he had no recollection of events. Walton now firmly believed that he had been working within his CO24 role and was no longer on the SLRT. He challenged the accuracy of the SDS file note.
- The Ellison Review found the file note to be a more accurate version of the events at that meeting, having been written just days after the meeting.
- N81’s proximity to the Lawrence family campaign and N81’s intelligence was the background to any insight N81 could offer.
- In October 2013, Walton agreed with the file note. The Ellison Review found it difficult to understand how a senior officer would profess to have had his memory refreshed by the SDS file note and give detailed narrative answers about the arrangements and content of the meeting and the consistency with his SLRT role.
- As well as agreeing, he then challenged some of the detail, such as he had not raised the black community and the black churches with N81. This suggested he did have some recollection of the meeting. He stated he had no recall of the correspondence route set up with CO24.
- Walton attended a meeting of the Lawrence Inquiry Part 1 Submission Team on 13 August 1998, in which the submission that he had prepared had been discussed.
- Mr Grieve believed Walton was still working to Bob Quick (SLRT) at the time of the meeting.

- There was no clear indication of when Walton left the SLRT. Walton believed he was 'transitioning'.
 - The Ellison Review found Richard Walton's changed recollection to be unconvincing.
56. Further findings were made specifically about the actions of Richard Walton:
- "We find that on a balance or probabilities, on 14 August 1998, DI Walton was not so completely detached from the Lawrence Review Team, that his visit to see this undercover officer was concerned only with another function in CO24".
 - "...we accept that the meeting was not his (RW) idea, but a request from a more senior officer in the SDS. We also accept that he agreed to the meeting without any detailed knowledge of the actual role and intelligence gathered by the undercover officer".
 - "...Mr Walton may well have simply taken up the invitation without realising that he was going to meet an undercover officer who was positioned close to the Lawrence family campaign."
 - "...these events suggest a degree of naivety on his part, rather than a coherent plan to achieve some real advantage..."
 - "Mr Walton does not remember asking anyone about whether he ought to go to the meeting, or telling anyone that he had been..In so far as we have been able to enquire, no one has indicated that they knew about him going".
 - "We have found no evidence that what Mr Walton discovered from N81 at the meeting was actually incorporated into or used towards the final submission made on behalf of MPS"
 - "...on 14 August 1998 during a break between the end of the evidence received by the Public Inquiry and final submissions being presented, a meeting took place between an undercover officer deployed into an activist group engaged with the Lawrence family campaign and an MPS officer appointed to assist the MPS in formulating its submission to the Inquiry. In our view such a meeting was wholly inappropriate."
 - "Given the contested issues at the Public Inquiry as to the honesty, integrity and openness of the MPS, and the disputes as to the true causes of the seriously flawed investigation of Stephen Lawrence's murder..... It would have been seen as the MPS trying to achieve some secret advantage in the Inquiry from SDS undercover deployment".
 - "There was no conceivable 'public order' justification for this meeting. Nor was there any other discernible benefit, and certainly none that could possibly outweigh the justifiable public outrage that would follow, if the fact of the meeting had been made public when the Inquiry resumed in September 1998. In our opinion, serious public order of the very kind so feared by the MPS might well have followed."

Referral to the IPCC

57. As a result of the findings made in the Ellison Review, the Metropolitan Police Service (MPS) made a referral to the IPCC on 07 March 2014, which identified

the actions of Richard Walton in attending the meeting with the undercover officer as potentially 'Discreditable Conduct' (under the 1985 Regulations) in that it had the potential of '*...undermining the inquiry and public confidence.*'

- D201
58. The referral also included detail that Mr Walton potentially provided inconsistent accounts to the Ellison Review, which was considered to potentially be an 'Honesty and Integrity' issue, under the Police Reform Act 2002.
 59. A second referral was received from the MPS, 07 April 2014 highlighting the action of Robert Lambert and Colin Black, again, both subject of mention in the Ellison Review. This referral was in respect of the actions of the two officers in arranging the meeting between Mr Walton and the Undercover officer, which again had the potential of '*...undermining the inquiry and public confidence.*'
 60. The IPCC investigation into these matters was declared independent on 22 May 2014.
 61. As the investigation progressed, the IPCC identified two further officers within the management structure of the SDS at the time of the meeting, Detective Chief Inspector N34 and Detective Superintendent N35. Both featured in the file notes relating to the meeting with the undercover officer. The IPCC requested MPS to refer the conduct of the two officers to be included in this investigation. This referral was made by the MPS on 25 February 2015.

Other Investigations – Operation Herne

- D63
62. Operation Herne, led by Chief Constable Mick Creedon, examined the activities of the MPS Special Demonstration Squad. The report published in July 2014 focused on SDS reporting on a number of Justice Campaigns. Operation Herne had previously reported on the allegations made by N37. The report in March 2014, concluded that there was no witness or documentary evidence supporting the allegations of N37.
 63. With the Ellison Review, Operation Herne examined the role of N81 and the meeting that took place with A/DI Richard Walton. Operation Herne was critical that the meeting took place and expressed concern at the information provided during the meeting. They recommended further investigation.
 64. The Operation Herne report of July 2014 made clear the following:
 - N81 was engaged on a long term covert infiltration into the target organisation which they were tasked to do by MPS Special Branch. It was assessed that the group was involved in, or had the potential to be involved in serious public disorder.
 - It is clear in both the Trinity (Operation Herne) and Ellison reports that there was no evidence found that N81 was tasked to infiltrate the Stephen Lawrence family or any other family campaigning for justice. Their focus was on their target group.
 65. The Operation Herne report (July 2014) further stated that they confirmed that N81 was never directly or indirectly asked or tasked by anyone at any level in the MPS to do anything in relation to the Stephen Lawrence family or campaign. They were not tasked or directed at any stage into any Justice Campaign. N81 never met Neville or Doreen Lawrence, nor attended their home or even spoke

to them during this deployment.

66. The report also recognises that much of the intelligence collected was obtained by attending public meetings where the information was being discussed in a public forum. The information was, therefore, already in the public domain.

Specific areas of terms of reference

67. The report will now consider the evidence available in respect of each of the terms of reference, I will then analyse the evidence and arrive at recommendations for each area of the investigation.

Terms of reference 1: To investigate

a). The actions and intentions of Mr Lambert and Mr Black in arranging a meeting between acting Detective Inspector Richard Walton, from the MPS Lawrence Review Team, and an undercover officer deployed close to the Lawrence family in August 1998.

c). What other senior officers, if any, knew about or were involved in sanctioning the meeting and what were the reasons and circumstances for this.

68. These terms of reference must now include consideration of the roles of N35 and N34 in respect of their intentions in arranging the meeting between Richard Walton and the undercover officer.
69. Some documentary evidence existed of this meeting, which was referred in the Ellison Review report.

File note prepared by Robert Lambert (Doc 4012)

- D172 70. This note was provided to the investigation by Operation Herne, forming Doc 4012, which was disclosed to Mr Walton prior to his first interview with the Ellison Review.
71. This document contains the file note produced by Robert Lambert of the meeting with the undercover officer. The note is produced by Robert Lambert on 18 August 1998, the meeting having taken place on 14 August. It identifies the two individuals involved as N81 and Richard Walton. N81 was the undercover officer who was subsequently provided with the nominal identification of N81. The file note stated that Richard Walton was working on the SLRT He noted that the two individuals talked about the Lawrence Inquiry from their own perspectives. Robert Lambert described the exchange as ‘*..a fascinating and invaluable exchange of information...*’.
72. Robert Lambert described that the discussion allowed Richard Walton to increase his understanding of the Lawrence’s relationship with campaign groups ‘*..as he continued to prepare a draft submission to the enquiry on behalf of he commissioner*’.
73. Robert Lambert goes on to describe three areas that are being addressed by Richard Walton and his team:
1. How to respond to the charge of institutional racism – where Robert Lambert

details that the team is likely to admit the essence of this criticism, but is trying to change the terminology to include phrases such as 'unconscious racism' and 'a lack of understanding of black culture'. He also notes that this acceptance of the criticism will shock many serving officers.

2. How to handle the second stage of the Public Enquiry – Robert Lambert notes that Richard Walton talked about plans for the Commissioner to attend public forums, and N81 pointed out the vulnerability of particular venues. Robert Lambert notes discussion around what tactics would be best used as a response by MPS.
3. How to regain the confidence of the black community – Robert Lambert noted that Commander Grieve was now in charge of post-Lawrence black community relations and hoping to move on to a more positive relationship with the black community. N81 talked about the enormity of this task, particularly with some parts of the community.
74. The meeting ends with Richard Walton highlighting the concerns of the Home Office about the wider implications of the Lawrence case, and the potential for public disorder.
75. This note is dated 18 August 1998, and submitted by Robert Lambert to his then manager, N34.

Folio 3A – SDS strategy documents 1998/1999

- D157
76. This document begins by referencing a briefing note prepared by Robert Lambert which examines [REDACTED] involvement in the Stephen Lawrence campaign, and [REDACTED] groups in relation to racist incidents in London. This entry is made by DCI N34 on 03 September 1998, and is directed to Detective Superintendent Colin Black (OCU Commander – effectively Head of Special Branch). This is a [REDACTED] note.
 77. Robert Lambert includes the following passage in this briefing note:

'In addition to providing valuable public order intelligence for 'C' Squad, N81's unique insight into the behind-the-scenes machinations of the Lawrence campaign has also proved invaluable to A/DI Richard Walton, who is currently attached to the Stephen Lawrence review team. At a recent SDS meeting N81 was able to give A/DI Walton a first-hand briefing on the case and offer some sound advice (e.g. that the Commissioner would be ill-advised to attend a public forum at Lambeth Town Hall as previously planned). In terms of the Metropolitan Police's long term strategy of seeking to rebuild damaged relations with the black community, N81 was able to comment authoritatively on the enormity of the task generally, and in N81's own local area [REDACTED], specifically.'
 78. There is no specific date on this briefing note, other than September 1998. The N34 entry is dated 03 September, so the briefing note must predate this.
 79. The document passed from N34, via Detective Superintendent N35 (signed 10 September 1998) to Detective Superintendent Colin Black, who makes the following entry on 14 September 1998:

'Thank you. The papers confirm that SDS is, as usual, well-positioned at the focal crisis points of policing in London. I am aware that DI Richard Walton of

CO24 receives and had off-the-record briefings from SDS. I have reiterated to him that it is essential that knowledge of the operation goes no further. I would not wish him to receive anything on paper...

80. The document then passed back to Detective Superintendent N35 (14 September 1998), eventually returning to DCI N34, who made an entry, dated 21 September 1998:
'...We agreed that the papers of this file would be retained in SDS.'
81. The purpose of the document is identified in the initial entry by N34, *'to outline SDS performance and targeting strategy in two key areas'*. The briefing note prepared by Robert Lambert identifies the contribution of the SDS operatives in these areas and he, in particular, refers to the meeting with Richard Walton. The description of the meeting here is consistent with his file note prepared just after the meeting. Again there is mention that N81 can give insight into the Lawrence campaign and also that Richard Walton is currently attached to the Lawrence Review Team.
82. The document passed through layers of management to reach the Head of Special Branch, Colin Black. He picked up on the briefing to Richard Walton, but described him as being from CO24, rather than the SLRT. This entry also emphasised the secrecy of this contact by stating that he has emphasised that knowledge of the operation goes no further and he would not wish Richard Walton to receive anything on paper.
83. Colin Black is the highest ranking officer who can be shown to have had sight of this document. It is then passed back through N35 to N34, the final entry suggests the papers were filed in SDS.

Other evidence

84. The Ellison Review followed a 'Maxwellisation' process towards its conclusion, in that if any individual was to be subject of potential criticism, the Review would write to that individual, setting out the potential criticism, allowing the individual the opportunity to respond to the potential criticism.
85. This process was followed with Robert Lambert. In a letter, dated 23 January 2014, the Ellison Review informed Robert Lambert that he was to be subject of criticism in the review. That criticism (in terms of the remit of this IPCC investigation) was that Robert Lambert had arranged the meeting between Richard Walton and N81, *'an officer working within an activist group associated with Stephen Lawrence's family. Richard Walton was, at the time, working on the MPS team preparing a response on behalf of the MPS at the Inquiry'*.
86. The potential criticism also included that there was no justification for intelligence *'that included personal and tactical elements regarding the Lawrence family and their approach, being provided to an MPS officer working on the MPS case to be presented to the Inquiry'*.
87. Robert Lambert responded to this criticism, via his representative, as follows:
'Bob was told that the purpose of the meeting was so that Richard Walton could fully brief the Commissioner. The request came to Commander Special Branch

D192

- D193 *and was delegated down to Bob. Bob was not given any limitations as to what should be covered in the meeting – Richard Walton would ask questions and N81 would answer them. The note referred to is Bob’s brief summary of what took place for his/his boss’ records*
- Bob does not recall and therefore cannot agree that personal and tactical elements were discussed during that meeting – his note does not disclose that such material was provided in Bob’s presence.’*
38. A similar letter was written to Colin Black. The Ellison Review informed Colin Black of potential criticism within the review. This criticism focussed on the meeting between Richard Walton and N81 and suggested to Colin Black ‘Given your senior role in SDS management at the time, we believe you may merit some degree of personal criticism for allowing such a meeting to take place’.
- D196 39. Colin Black initially responded to this criticism on 03 February 2014, and pointed out ‘The idea, for example, that I could ‘allow’ a meeting to take place looks like it fails to grasp roles and responsibilities where the SDS was concerned. Similarly, it is simply wrong to refer to me as a ‘senior SDS officer’.
- D194 90. Colin Black wrote a second letter to the Ellison Review on 11 February 2014 and included in this ‘My dealings with SDS during my time in Special Branch could pretty much be written on the back of the proverbial postage stamp. As a unit it had a direct line to senior Met Police officers, of higher rank than anyone in SB..’ Mr Black did accept at times he was part of the ‘senior ‘line’ command’.
- D195

IPCC Subject interviews

Robert Lambert

91. Robert Lambert was a Detective Inspector in the MPS Special Branch (MPSSB) in 1998. He has now retired from the police service. He was served with a Regulation 16 Notice on 11 August 2014, which identified the allegations which had been assessed as potentially gross misconduct.
- D42 92. The Notice served on Mr Lambert set out that in 1998 Mr Lambert was a Detective Inspector (DI) in the MPSSB and responsible for the management of officers deployed in the Special Demonstration Squad (SDS), who would work undercover. Mr Lambert arranged the meeting between A/DI Walton and the undercover officer, who was deployed into one of the groups seeking to influence the Lawrence family campaign.
93. Mr Lambert was aware that A/DI Walton was seconded to the MPS Lawrence Review Team, which was preparing final submissions on behalf of the Commissioner of the MPS, to the Stephen Lawrence Inquiry. The meeting was arranged to allow information to be passed from the undercover officer to A/DI Walton, which could then be used by the MPS in preparing the final submission.
94. Arranging the meeting at this time had the potential to seriously undermine public confidence in the police service
95. Mr Lambert was interviewed on Tuesday 16 December 2014 and answered all questions put to him.
96. Robert Lambert stated in interview that he believed the request to arrange the

meeting had come from senior management. He was unable to recall who the request had come from. He believed, when he had been previously interviewed by Operation Herne, that Colin Black was part of the senior management, and from what he had also read, this seemed most likely, however, he was unable to recall any detail now.

Y2

Y2a

97. Robert Lambert stated that he felt that the request to arrange the meeting was lawful and legitimate. He had no thought that the request was in any way inappropriate. Robert Lambert described the context of the request as follows. N81 was reporting intelligence from N81's target group infiltrating the Stephen Lawrence campaign and this had been ongoing from before this request. If N81 was with N81's target group and they attended a meeting of the Stephen Lawrence campaign, then that would be reported through the normal channels. The reporting by N81 was known throughout the senior management.
98. Robert Lambert was unable to provide any detail on who requested the meeting but he stated that he could completely rule out the possibility that he organised the meeting of his own volition. This was not something that would happen.
99. He stated that he had been asked to arrange other meetings between undercover officers [REDACTED]. He also arranged meeting for C squad officers and undercover officers, but again he could not give any detail of who would have requested those meetings.
100. His role at the time was as an Operations manager, assisting the Detective Chief Inspector with managing operational deployments.
101. Robert Lambert was asked about the rationale for the meeting taking place, and he referred to the File Note. He felt that a significant part of the rationale was to allow the person making the request to gain an insight into what was happening in the area where the undercover officer is active, this was '*...offering Richard Walton the insight, enabling N81 to emphasise what N81's target group, what they were about... to give a little more understanding about their strategy for infiltrating the campaign*'. Robert Lambert stated this understanding was prompted by the file note and his knowledge of N81's role. It was not based on any recollection of any conversation that he had.
102. The request was for Richard Walton to meet N81. He had no knowledge of any other meetings being arranged and any recollection he had was based on the file note.
103. When questioned about Richard Walton's role at the time, Robert Lambert stated that it was clear to him that the meeting was to be arranged in the context of the Stephen Lawrence case. His recall of this was based on the file note. He could not recall the detail of how he arranged the meeting with Richard Walton.
104. Robert Lambert arranged the meeting to take place at his own flat, where he lived at the time. This was not an unusual practice and he had used his home address on previous occasions, for other, non-related meetings.
105. Robert Lambert stated that he was given the impression that Richard Walton had asked for this meeting. He did not recall any discussion with Richard Walton about what was to be discussed at the meeting.
106. He recalled the meeting lasted about two hours but without the file note he did not feel he would recall much of the detail. He considered that this was an

D172

'important' meeting but this rationale was about operational security rather than a Stephen Lawrence campaign link.

107. Robert Lambert was questioned about the role of N34 in these arrangements. He stated that he would not have been asked to arrange a meeting and exclude N34 from knowledge of it. He also accepted that N34 could have been involved in the management request.
108. Robert Lambert was unable to recall if he had made notes during the meeting. The file note did allow Robert Lambert to recollect that much of N81's reporting was on N81's interest group and their interest in the Stephen Lawrence campaign and *'my broad understanding was that that was the reason Richard Walton wanted this meeting'*.
109. Robert Lambert could not recall much further detail beyond that contained within the file note and stated that the issue around Lambeth Town Hall would have been reported through the normal intelligence channels. This meeting was not a substitute for that process. He felt that the information flow was generally from N81 to Richard Walton.
110. Robert Lambert could not recall briefing any of his management team on the meeting. He would have expected there to have been some verbal briefings on the day, but he could not recall any in detail. He described the purpose of the file note as putting the meeting on record and providing a brief summary for his management and colleagues. He would, unless N34 was not on duty, have briefed N34 on the meeting. He could not recall any discussion that this meeting was to be considered 'secret', but that would have been his understanding.
111. The accuracy of the file note was discussed and Robert Lambert described that as a summary, picking out the key points then he did feel it was accurate, but it was never meant to be a detailed record, and it was an internal SDS document.
112. Robert Lambert was questioned about Richard Walton's background as having previously been a Special Branch officer. Robert Lambert did have some knowledge of Richard Walton but had not worked directly with him. He could not recall any conversations about Richard Walton's background, but he did form the view that Walton's background in Special Branch, was a consideration in his involvement in this meeting.
113. Robert Lambert stated that he had no basis to think that this meeting was 'underhand'. He believed he would have sought clarity of the requirements for the meeting and the detail, but cannot now recall the detail of the discussion he had. He could not recall how Richard Walton's role in the Stephen Lawrence Inquiry fitted into the rationale for the meeting, but he was satisfied that it did.
114. He stated that much of N81's reporting was gathered from public meetings so he did not feel there was an issue with Richard Walton having this information. The 'tactical elements' criticism, would cover other intelligence being reported by N81, not just intelligence at this meeting. It would also include intelligence being provided through legitimate channels from other sources.
115. Robert Lambert was asked about the timing of the meeting and the potential risks that that caused. He stated that he did not have any considerations that this meeting added to any risk at the time. He had confidence in his senior management that the risks and disclosure would be dealt with appropriately.

D192

116. Robert Lambert was then asked about the flow of information in the meeting as the file note suggested it was from Richard Walton to N81, yet he had said it was the other way. He responded to this by saying that those who would have read the file note would have been aware of the issues that N81 was involved in, whereas the points raised by Richard Walton would not have been so well known.

Colin Black

D36

117. Colin Black was a Commander in the Metropolitan Police Service Special Branch in 1998. He has now retired from the police service. He was served with a Regulation 16 Notice on 12 August 2014 which identified the allegations that had been assessed as potentially gross misconduct.
118. The notice served on Colin Black set out that in 1998 he was a Commander within the Metropolitan Police Service Special Branch (MPSSB), and responsible for the management of all officers deployed within Special Branch, including officers deployed within the Special Demonstration Squad (SDS) who worked undercover.
119. In August 1998, he was involved in authorising and arranging a meeting between Acting Detective Inspector (A/DI) Richard Walton and an undercover officer who was deployed into one of the groups seeking to influence the Lawrence family campaign. He was aware that A/DI Richard Walton was seconded to the MPS Lawrence Review Team, which was, at that time, preparing a final submission on behalf of the Commissioner MPS, to the Stephen Lawrence Inquiry.
120. This meeting was arranged to allow information to be passed from the undercover officer to A/DI Walton, which could be used by the MPS for preparing the final submission to the Stephen Lawrence Inquiry. Authorising and arranging this meeting at that time had the potential to seriously undermine public confidence in the police service.
121. Colin Black was interviewed on Thursday 18 December 2014 and answered all questions put to him.
122. Colin Black was asked to identify his role within MPS Special Branch during 1998. He stated that he was the Head of Operations. Under his command were a number of squads covering areas such as Counter terrorism, Domestic extremism, International terrorism and others. One of these areas was S squad, which was run by a detective superintendent, believed to be N35. He was responsible for a number of departments, for example, Surveillance, Technical Support and one of these departments was the SDS. There was then either a detective chief inspector or detective inspector in operational charge.
123. He stated that he had little day-to-day contact with operational officers. His areas of responsibility were strategic areas around budgets, staffing and policy. He would only know what was happening within a unit, if it was brought to his attention by a superintendent, or if he had visited a unit to speak with staff.
124. He stated that he had no recall of the meeting between Richard Walton and N81. Due to the secrecy around SDS, he did not think meetings with undercover officers were taking place.

125. Colin Black stated that Richard Walton was working directly for the Commissioner, so he did not think he would be asked to authorise the meeting. He did not recall being asked to authorise this or being told, that it was happening.
126. He stated that he was aware of Richard Walton having worked in Special Branch, but he could not recall any conversation with him. He could not recall any conversation with Richard Walton about this meeting.
127. Colin Black stated he had no knowledge of the meeting between Richard Walton and N81 prior to it taking place. He only became aware afterwards. He had no recollection of having been told about the meeting, but accepted that he did know, because of the note that he had written. He cannot recall when he knew about the meeting.
128. He stated that he could not recall seeing any intelligence around the Stephen Lawrence Inquiry. He felt he may possibly have been aware of Richard Walton's role in relation to Stephen Lawrence, but he confirmed that he had no memory of any conversations with Richard Walton about the meeting with the undercover officer and no memory of a conversation with Richard Walton about the Stephen Lawrence Inquiry. He could not recall any direction that Special Branch were given in relation to intelligence relating to the Stephen Lawrence Inquiry. He stated that he had little operational input and that tasking of sources did not come to him for approval.
129. Colin Black was questioned on the circumstances of the meeting between Richard Walton and the undercover officer, the timing of the meeting, the role that Richard Walton was fulfilling and the role of the undercover officer. Colin Black did not believe there was anything inappropriate in the meeting taking place. He strongly disputed that N81 was tasked 'into' or 'close' to the Lawrence family. He strongly disputed that the meeting was inappropriate.
130. Colin Black was questioned in relation to the Robert Lambert file note. He stated that he did not recall anything from his entry on the file note. He could not recall why he talked about 'ad hoc briefings' and he presumed he had been told about this. He confirmed that he must have thought Richard Walton was in CO24. He interpreted his minute as a post event wrap up, highlighting some work that had been completed. He interpreted some of the document ('...essential knowledge of the operation goes no further, don't receive anything on paper...') as him putting conditions on the meeting, but this could not be the case as it was after the meeting has taken place. He emphasised that there was nothing in his note that suggested he had knowledge of the meeting before it took place.

D172

N35

131. N35 was a Detective Superintendent in the MPSSB in 1998. He has now retired from the Police Service. He was served with a Regulation 16 notice on 12 May 2015, which identified that the allegations had been assessed as potentially gross misconduct.
132. The notice served on N35 set out that in 1998 he was a Detective Superintendent in the MPSSB, and responsible for the management of officers deployed within Special Branch, including officers deployed within the Special

Demonstration Squad (SDS) who worked undercover.

- D199
133. In August 1998, he was involved in authorising and had knowledge of a meeting between Acting Detective Inspector (A/DI) Richard Walton and an undercover officer who was deployed into one of the groups seeking to influence the Lawrence family campaign. He was aware that A/DI Richard Walton was seconded to the MPS Lawrence Review Team, which was, at that time, preparing a final submission on behalf of the Commissioner MPS, to the Stephen Lawrence Inquiry.
134. This meeting was arranged to allow information to be passed from the undercover officer to A/DI Walton, which could be used by the MPS in preparing the final submission to the Stephen Lawrence inquiry. Authorising and arranging this meeting at that time had the potential to seriously undermine public confidence in the police service.
135. N35 provided a response to his Regulation notice on 12 May 2015 in which he stated:
- 'I did not authorise the August 1998 meeting arranged by Detective Inspector Robert Lambert. Furthermore, I had no knowledge of it at the time and to the best of my recollection, I was not aware of it subsequently'.*
- D155
136. He goes on in the response to describe that he recalled a meeting with Colin Black (then Detective Chief Superintendent), in which Colin Black told him about a liaison he had established between Special Branch and CO24. He stated he had no recollection of the 'ad hoc' briefings to Richard Walton and he saw nothing untoward in Special Branch providing assistance to CO24.
137. N35 was interviewed on Thursday 04 June 2015 and answered all questions put to him.
138. N35 initially gave an overview of his career. He stated that he had been in Special Branch Ports Unit in 1995, and in September 1997, transferred to S Squad. The SDS was a small part of his responsibility and he considered it to be a self-contained unit. N35 never served on the SDS, he retired in 2003, still on S Squad.
- Y4
139. N35 stated that he would have had little operational involvement with undercover officers, he believed that a lot of SDS issues were taken straight to Colin Black. He very rarely met with undercover officers, this was the remit of the Detective Inspector and Detective Chief Inspector.
140. He would not have seen all tasking, but he could not recall any conflict over any tasking. The DCI and DI from SDS would periodically come to New Scotland Yard for meetings and they would update either Colin Black or himself. There were no regular meetings with SDS staff.
141. N35 stated that he never knew Richard Walton. He could not recall ever having a conversation about him or with him. He did not recall ever meeting Richard Walton or speaking to him.
142. N35 was questioned about his recollection of the Stephen Lawrence Inquiry and he stated that his only knowledge was what he saw in the media, and it was considered to be more of a CID issue and not a Special Branch issue. These were quite separate departments. He stated that at general superintendent level,

there was little interest in the MacPherson Inquiry.

143. N35 stated that he had dealings with N37, and he felt that the views being expressed by N37 now, were N37's alone. He felt that N37 had had ample opportunity to raise the issues about the Lawrence's and undercover officers at the time, that N37 did subsequently, but N37 never did.
144. N35 stated that he had no knowledge of the arrangements for the meeting with Richard Walton and the undercover officer. He accepted from the minute sheet that he later had knowledge of it. He recalled a conversation with Colin Black about a correspondence route to CO24, but did not recall the Colin Black minute at all. He did not think undercover officers met anyone outside of Special Branch.
145. N35 did not recall the Robert Lambert file note. Having read it now, the note did not concern him as the Lawrences were not being targeted. He stated the meeting with Richard Walton took place without his knowledge. He could not recall any conversations about the meeting.
146. He was unable to say if this Intelligence Summary was a one off document or not. He stated that if he had been concerned when he learned of the meeting he would have raised it with Colin Black. He had no recall of raising this. He did not agree with the Ellison Review 'spy in the Lawrence family' conclusions. The intelligence gathering was around the groups not the Lawrence family.

N34

147. N34 was a Detective Chief Inspector in the MPSSB in 1998. He has now retired from the police service. He was served with a Regulation 16 notice on 14 May 2015 (via his representative), which identified that the allegations had been assessed as potentially gross misconduct.
148. The notice served on N34 set out that in 1998 he was a Detective Chief Inspector in the MPSSB, and responsible for the management of officers deployed within Special Branch, including officers deployed within the Special Demonstration Squad (SDS) who worked undercover.
149. In August 1998, he was involved in authorising and had knowledge of a meeting between Acting Detective Inspector (A/DI) Richard Walton and an undercover officer who was deployed into one of the groups seeking to influence the Lawrence family campaign. He was aware that A/DI Richard Walton was seconded to the MPS Lawrence Review Team, which was, at that time, preparing a final submission on behalf of the Commissioner MPS, to the Stephen Lawrence Inquiry.
150. This meeting was arranged to allow information to be passed from the undercover officer to A/DI Walton, which could be used by the MPS in preparing the final submission to the Stephen Lawrence inquiry. Authorising and arranging this meeting at that time had the potential to seriously undermine public confidence in the police service.
151. N34 was interviewed on 24 September 2015 in the presence of his legal representative. He declined to answer any questions put to him during the interview. N34 subsequently provided a statement, under the misconduct caution

D200

(for retired officers), which was received by the IPCC on 14 October 2015.

- Y5 152. In his statement, N34 set out some of his past career, in that he joined Special Branch in [REDACTED] and worked as an [REDACTED] from [REDACTED] to [REDACTED]. He was promoted to detective chief inspector in 1997 and transferred to the SDS in mid- 1998. Robert Lambert was working to him as a detective inspector. N34 retired in 2001.
- S1 153. N34 stated that the first time that he was asked to recall the meeting between Richard Walton and the undercover officer was in May 2015, by the IPCC. He did not have a clear recollection of the circumstances surrounding the meeting, but what he would say in his statement was a reconstruction based on the documents disclosed to him.
154. He had no recollection of how this meeting came to be arranged or who initiated it. He had no recollection of being involved in making a request to Robert Lambert to arrange this meeting.
155. He was shown the Robert Lambert file note and the SDS Intelligence Update September 1998. He had no recollection of these documents, but accepted that he must have read the documents, as he had initialled the file note. He accepted that he must have read the Robert Lambert file note on 18/8/98, but he had no recollection of signing it.
- D172 156. He referred to the SDS Intelligence Update September 1998 (Colin Black file note). He accepted that he must have read this file note, but he had no recollection. He did not consider this to be suggestive of anything inappropriate taking place.
157. N34 stated, having read the disclosed statement of the undercover officer that he agreed with the comments of the officer in that the officer was not tasked into the Stephen Lawrence Campaign or the family. He states that there was no operation to undermine the Stephen Lawrence campaign, and he believed that allegations suggesting this were misconceived.
- S2a 158. He further stated that while he was in SDS, no-one considered whether it was appropriate or proportionate to continue undercover deployment in a group that got close to the Lawrence family, or disclosure to a Public Inquiry. It did not occur to N34 that the meeting between Richard Walton and the undercover officer could have been seen as inappropriate while the Public Inquiry was in progress. He stated that disclosure of the role of an undercover officer would only have been considered in extreme circumstances. He finished by stating that there was not an attempt to spy on the Lawrences.

Richard Walton

159. Commander Richard Walton is still a serving officer in MPS. He was served with a Regulation 16 Notice on 30 July 2014, detailing allegations which had been assessed as potentially gross misconduct.
- D38 160. This notice set out that Commander Walton was an Acting Detective Inspector (A/DI) in 1998 and seconded to the MPS Lawrence Review Team, which was responsible for drawing up the final submissions on behalf of the MPS Commissioner, for the Stephen Lawrence Inquiry.
161. In August 1998, A/DI Walton attended a meeting with an undercover officer, who

had been deployed into one of the groups seeking to influence the Lawrence family campaign. The undercover officer could have been in possession of information which had the potential to influence the MPS submission to the Stephen Lawrence Inquiry. Attending this meeting had the potential to seriously undermine public confidence in the police service.

162. Commander Walton was then interviewed by the Ellison Review in October 2013 and February 2014 about his recollection of the meeting. In the second interview, in February 2014, Commander Walton changed his recollection of the meeting. Providing different accounts had the potential to mislead the Ellison Review and potentially undermine public confidence in the police service.
163. Commander Walton was interviewed on Friday 19 December 2014, when he answered all questions put to him.
164. Richard Walton began the interview with the IPCC by stating that to date he had been interviewed twice by the Ellison Review, he had now read the Operation Herne and Ellison reports. He wanted to co-operate fully with the IPCC Independent investigation.
165. In terms of this section of the report, the only aspect of the Richard Walton interviews that is relevant is that Richard Walton was asked if he briefed anyone on the content of the meeting, and he stated that he could not recall if he did or if he did not.
166. This interview will be discussed in more detail later in this report.

Y1
Y1a
Y1b
Y1c

Analysis of the evidence

167. In order to reach conclusions it was necessary for me to analyse and evaluate the evidence. Where I have needed to make factual findings I have applied the “balance of probabilities” standard of proof. In deciding whether something is more likely than not to have occurred, I have had regard to all of the available evidence and the weight to be attached to it.
168. Since this case was one subject to special requirements I am required only to form an opinion about whether there is a case to answer for misconduct or gross misconduct for each subject. In doing so I will not reach findings of fact that would be conclusive of misconduct or gross misconduct which may take place – these findings should be left for any subsequent misconduct hearing or meeting. For retired officers there can be no misconduct hearing or meeting.
169. The key independent evidence about the meeting is the file note produced by

Robert Lambert on 18 August 1998 and the September Intelligence Summary which bears comments from N34, N35 and Colin Black.

The Robert Lambert File Note

- D172
170. This note contains a large amount of detail of an area that it would perhaps be expected that Robert Lambert would not have detailed knowledge about. In his role at the time, he would, undoubtedly, have been aware of the ongoing work by the SLRT, and that there was a further submission to be made to the Inquiry. But he would not be expected to have knowledge of a large amount of detail.
 171. It is my assessment that the note highlighted the significant impact he believed SDS had made on an ongoing, current issue for MPS at that time. It demonstrated that the undercover officer had been tasked to the heart of a current issue, and that tasking could potentially have had enormous benefit for MPS in their interaction with the MacPherson Inquiry.
 172. The note described an exchange of information, and that there was a significant flow of information from Richard Walton to the undercover officer. If the briefing was to be for Richard Walton, it would potentially be expected that more detailed information would have been provided to him. Significantly, Richard Walton, described the three key areas that were causing most concern for the SLRT.
 173. The file note is put together by Robert Lambert, most likely for internal use only within SDS, to inform SDS senior management of the success of this interaction with Richard Walton. To inform them [REDACTED] that the SDS had achieved something significant. The evidence suggested that briefings with external stakeholders were rare events.
 174. The fact that it was apparently not commonplace for these briefings to take place would add to the significance of this exchange of information.
 175. The openness of the report by Robert Lambert suggested that he saw nothing sinister or underhand in this meeting taking place and the file note did not suggest at all that the meeting was inappropriate. There was no consideration in the note as to whether there was to be any disclosure that this meeting had taken place. Lambert reported the facts to his management, aware that he was working in an environment of extreme secrecy.

D157

The Colin Black file note (DOC 1784)

176. The message about what took place at the meeting was consistent, in that there was an exchange between an undercover officer and a representative from the SLRT. There was consistent detail, in relation to the advice about the vulnerability of the Commissioner attending Lambeth Town Hall. The detail entered here tends to support the accuracy of the initial briefing note, albeit, they are prepared by the same individual. The detail of this meeting appeared not to be the main thrust of this document. The detail was included to add weight to the importance of the work and contribution made by SDS operatives.
177. The note passed through a number of individuals in the management chain and there was no questioning of the legitimacy of the meeting, how it came about, who asked for it to take place, whether it was part of an ongoing tasking. It suggested only positive outcomes from the linking of the undercover 'behind-the-

scenes' knowledge and Richard Walton, who was engaged in the work of the SLRT.

178. Within the SDS Management environment there appeared no suggestion that this meeting may be inappropriate in any way, nor badly timed in view of the ongoing MacPherson Inquiry. At Colin Black's position within MPS, it would be expected that he would have knowledge of the ongoing position with the MacPherson Inquiry. A meeting had taken place with an individual who was not a stakeholder, nor involved in the tasking of the undercover officer. The meeting would have been out of the ordinary, which would have been evident to all those who were receiving this briefing note, yet there is no questioning of the legitimacy of it. There is no suggestion that the fact the meeting had taken place would be disclosed at any stage. All of those in this management chain are working under the expected secrecy of the SDS environment, with these documents being filed within that same environment.
179. This evidence demonstrates in unequivocal terms that:
 - The meeting with N81 took place on 14 August 1998
 - Those involved in the meeting were N81 and Richard Walton.
 - Robert Lambert put the arrangements in place for this meeting.
180. Robert Lambert in interview under caution said that he had been asked to arrange this meeting by 'senior management'. He was unable to say who, exactly, had asked him to do this. He thought it was unlikely that he would have been asked to arrange this meeting and exclude N34, who was his first line supervisor. The meeting took place in Robert Lambert's home (at that time), which was not an unusual practice. The practice of 'tasking' officers, meeting directly with undercover officers was not unheard of, but was not common practice.
181. Robert Lambert believed the request to hold this meeting had come from the SLRT end, he believed he would have sought some clarification on the detail of the meeting, but he was unable to recall now what this detail was, or how Richard Walton's role in the SLRT figured in the rationale for the meeting.
182. Robert Lambert did not consider whether the meeting may or may not have been inappropriate. He understood that much of N81's intelligence was gathered from attending public meetings, so Robert Lambert did not see that there could be any issue with Richard Walton having access to this intelligence.
183. He stated he was tasked by his own 'senior management' to arrange the meeting, he made notes of the content of the meeting and reported upon it within the SDS environment. His file note was subsequently circulated among other SDS officers, commented upon by supervising officers, and ultimately subject of favourable comment by Head of Operations within Special Branch, Colin Black.
184. Robert Lambert could not provide any detail on how the arrangements for the meeting were put in place.
185. Colin Black was the Head of Operations within Special Branch at the time the meeting between the undercover officer and Richard Walton took place. The September Intelligence Summary (first entry dated 03 September 1998) demonstrated that he had seen the file note produced by Robert Lambert. Colin Black stated that he had no knowledge of the meeting taking place at the time,

- but accepted from his comments that he must have known afterwards.
186. As Head of Operations within Special Branch he was in a strategic role and he would not have expected, nor did he have, day-to-day contact with operational officers. If this meeting was being arranged, he would not have expected to have been consulted on it.
 187. The file note which he created demonstrated knowledge of the meeting after it had taken place. He denied that he was involved in authorising or allowing this meeting to take place. Robert Lambert stated in interview that the request to arrange this meeting had come from 'senior management'. Robert Lambert was unable to say who made this request. He knew and had regular contact with those in the management chain above him, N34, N35 and Colin Black.
 188. There is no evidence that Colin Black had knowledge of the meeting or its arrangement prior to it taking place.
 189. Colin Black had no recollection of any conversations with Richard Walton about this meeting or the Stephen Lawrence Campaign. Colin Black did not accept that the meeting between the undercover officer and Richard Walton was inappropriate.
 190. N35 was the Head of S Squad, which included the SDS. He stated that he had little day-to-day contact with operational undercover officers, this contact was managed by Robert Lambert and N34. He could not recall any conversations with or about Richard Walton. He had no memory of the meeting with Richard Walton taking place and he could not recall any conversations in respect of this meeting.
 191. N35 did not recall the Lambert file note and he was unable to say if the Intelligence Summary was a one-off document or not. He accepted that he had later knowledge of the file note as he had initialled it.
 192. The file note did not cause N35 any concerns as he did not consider that SDS were targeting the Lawrence family, they were targeting interest groups, as such, he did not consider that the meeting between the undercover officer and Richard Walton was inappropriate.
 193. The Colin Black file note demonstrated that N35 had knowledge of the meeting after it had taken place. There is no documentary evidence that suggests that N35 could have prevented this meeting taking place, or had knowledge of it prior to it occurring. Robert Lambert did not suggest that N35 directed him to arrange the meeting, albeit, N35 formed part of the 'senior management' of the SDS. The file note entry by Colin Black referred to the file note being sent back to N35, and the suggestion is that the file note was filed within the SDS.
 194. N34, at the time of this meeting, was a detective chief inspector within the SDS environment, he was a direct supervisor of Robert Lambert. He stated that he had no recollection of making a request to Robert Lambert to arrange this meeting. Lambert stated that he would not have been asked to arrange a meeting and to exclude N34 from knowledge of it. Robert Lambert did not specifically name N34 as the source of the request, but stated that he could have been involved in the chain of command.
 195. N34 chose to answer 'No Comment' to all questions put to him and he subsequently provided a statement under the misconduct caution (for retired

officers), covering the areas of the interview questions. This effectively meant that N34's answers to questions and his recollection of events about this meeting could not be properly challenged in an interview.

196. N34 accepted that he saw the Lambert file note on 18 August 1998 that he initialled the document, but he had no recollection of it. N34 stated that the undercover officer was not tasked into the Stephen Lawrence Campaign or Lawrence family and that at no stage did he consider the meeting between the undercover officer and Richard Walton to be inappropriate.
197. The documentary evidence confirmed N34's knowledge of the meeting just four days after it had taken place. Yet there is no evidence that he was involved in authorising or making arrangements for the meeting to take place. Significantly, he is not named by Robert Lambert, even though he must have had a very close working relationship with him.

Conclusions

198. Below, I have set out my conclusions for the appropriate authority and Commission to consider.
199. These conclusions are based on the evidence obtained during the investigation and summarised above.
200. If there are to be court or disciplinary proceedings it will be for the relevant tribunal in those proceedings to make final determinations. For example, where I conclude that person subject to the investigation has a case to answer for gross misconduct, this does not amount to a legal determination that there has been gross misconduct. If a charge is then brought by the appropriate authority a misconduct hearing will hear the evidence, and make its own findings about whether the charge is proved or not. For retired officers there can be no misconduct proceedings.
201. I have made factual findings, where appropriate, by applying the balance of probabilities test to the evidence. In other words, I have decided whether it is more likely than not that the fact alleged occurred.
202. After reviewing my report and considering my recommendations, the Commission will decide whether any organisational learning has been identified that should be shared with the organisation in question. They may also recommend or direct, unsatisfactory performance procedures.

Robert Lambert

203. Robert Lambert provided no evidence on who asked him to arrange this meeting. His evidence that the request came from the SLRT end is at odds with the evidence provided by Richard Walton. Lambert provided no detail on how the arrangements for the meeting were put in place. Whilst Lambert had arranged meetings for tasking officers and security service officers previously, the request for a meeting with an officer from the SLRT should have caused him to question the validity of the request.

204. He was aware in vague terms of Richard Walton's role on the SLRT. Robert Lambert should have been aware that there was a danger that had knowledge of the meeting entered the public domain, there could have been serious consequences for the public perception of the force. Robert Lambert's actions had the potential to bring discredit on the reputation of the force.
205. There is no suggestion from those interviewed that Robert Lambert would have acted of his own volition in bringing this meeting about. Robert Lambert, himself, dismisses this as a suggestion. There is, however, no evidence to link other members of the SDS to any of the arrangements for this meeting.
206. The original MPS justification for the deployment of SDS officers was to prevent public disorder although there is evidence that this remit had been widened in 1997¹ both Lord John Stevens and Lord Condon, in their evidence to the Ellison Review, accepted, as Ellison concluded, that using SDS officers to achieve some (secret) advantage when making submissions to the MacPherson Inquiry from SDS undercover employment which had access to the Lawrence family's circles, would cause justifiable public outrage. In the investigator's opinion, if the fact of the meeting had been made public when the Inquiry resumed in September 1998, serious public order of the very kind so feared by the MPS might well have followed.
207. At the time of the meeting in August 1998 police disciplinary offences were set out in the Discipline Code contained in Schedule 1 to the Police (Conduct) Regulations 1985. Paragraph 1 set out a disciplinary offence where an officer behaved in a manner reasonably likely to bring discredit on the reputation of the force or the police service.
208. **It is the investigator's opinion that had Robert Lambert still been a serving officer, a reasonable misconduct panel or meeting properly directed could find that on the balance of probabilities that he had behaved in a manner likely to bring discredit on the reputation of the police service. It is therefore my opinion that there is a case to answer for Robert Lambert in respect of misconduct. Robert Lambert was a mid ranking officer within the SDS at the relevant time, his own evidence is that he was asked to arrange the meeting by a senior officer. It is clear that he reported on the meeting to his senior officers in an open and transparent manner and his superiors were pleased that it had taken place. That there was no recognition of the impropriety of holding the meeting may reflect poorly on the culture of the SDS, which is a matter for the Herne Investigation and the Public Inquiry to be led by Lord Justice Pitchford. However it is accepted that Robert Lambert was acting with the knowledge and (on the balance of probabilities) at the request of his superiors, albeit that it has not been possible (see below) to identify who in his chain of command asked him to arrange the meeting. For this reason it is the Investigator's opinion that this potential failing would not have been so serious as to justify dismissal and the recommendation is, therefore, one of misconduct only.**

¹ Operation Herne Report 2 paragraph 15.1

Colin Black

209. Colin Black was in a strategic role within Special Branch. The evidence available shows he had knowledge of the meeting after it occurred and he could not, therefore, have prevented it taking place. There is no positive evidence that he knew of it beforehand although Richard Walton's evidence in his first interview with the Ellison Review was that he had had a conversation with Colin Black in which he was asked if he was comfortable receiving intelligence relating to SDS, This may suggest that the meeting was instigated by him. However Richard Walton's own evidence is that he cannot be sure that this was before the meeting.
210. Therefore there is insufficient evidence available to find that Colin Black was involved in authorising or arranging the meeting between Richard Walton and the undercover officer. Although he was undoubtedly aware of it after it had taken place, the Discipline Code did not require that officers reported improper conduct, as they are required to do so now.
211. **It is the investigator's opinion on the basis of the evidence available, that a reasonable misconduct panel or meeting properly directed could not find on the balance of probabilities that there had been a Breach of the Discipline Code and so there is no case to answer in respect of Gross Misconduct.**

N35

212. N35 was in a strategic role, with little day-to-day contact with undercover officers. The evidence available in terms of the file note and the Intelligence Summary, only suggest that he had knowledge of the meeting after it had taken place. He was, however, part of the senior management within the SDS management structure. As set out above the Discipline Code at that time did not require that he reported improper conduct.
213. There is insufficient evidence that he was involved in authorising or making the arrangements to put this meeting in place.
214. **It is the investigator's opinion on the basis of the evidence available, that a reasonable misconduct panel or meeting properly directed could not find on the balance of probabilities that there had been a Breach of the Discipline Code and so there is no case to answer in respect of Gross Misconduct.**

N34

215. With such a close working relationship between Robert Lambert and N34, it is inconceivable that Robert Lambert would have been able to make the arrangements for this meeting to take place without some knowledge on the part of N34.
216. However, to make a positive recommendation in respect of N34, there must be evidence that demonstrated that he had knowledge of the meeting prior to it taking place. The evidence available is that he knew about the meeting from Robert Lambert's file note, four days after the meeting had take place.
217. However the documentary and witness evidence available is insufficient for a

tribunal to be able to infer, that he incited, encouraged or was knowingly an accessory to the meeting being arranged

218. **It is therefore the investigator's opinion on the basis of the evidence available, that a reasonable misconduct panel or meeting properly directed could not find on the balance of probabilities that there had been a Breach of the Discipline Code and so there is no case to answer in respect of Gross Misconduct.**
219. I am satisfied, on the balance of probability, that the meeting between N81 and Richard Walton was initiated within the SDS. The evidence available from Robert Lambert suggested that he was instructed to put the meeting in place by 'senior management'. He was unable to identify or recall who instructed him. Robert Lambert stated that he would not have been asked to arrange the meeting and exclude N34 from any knowledge of it and N34 could have been involved in the chain of command.
220. In terms of positive evidence, the only officers who can be shown to have been involved in making the arrangements for this meeting are Robert Lambert and Richard Walton. No other officers can be linked to knowledge of the meeting until after it had taken place, so no officer 'senior' to Robert Lambert, could be proved to the required standard to have had any influence on the situation. The documentary evidence available demonstrated that N34, N35 and Black all became aware that the meeting had taken place. All said they were unable to provide any recollection of having seen the documentation discussed, but all accepted that they were aware as they have put comment or initials on the documents. Neither N34, N35 nor Black considered the meeting to be inappropriate.
221. Richard Walton cannot recall seeking any advice or guidance on attending the meeting and cannot recall briefing anyone after the meeting.
222. The file note entry made by Colin Black, he felt suggested a 'pat on the back' for those involved. The correspondence route he then set up, was a route for intelligence to flow into CO24, and this again would be after the meeting had taken place. The documents demonstrated that they remained within SDS.
223. Unfortunately, as set out above, although the investigator accepts, on the balance of probabilities that Robert Lambert was asked by someone in senior management to arrange the meeting, it is not possible to establish, to the required standard of proof which individual(s) that was.
224. It is the investigator's opinion based on the balance of probabilities, that there is no evidence available that any senior officer outside of the SDS knew about this meeting before or after the meeting.

Terms Of Reference:

To investigate 1;

b). The actions and intention of Mr Walton in attending a meeting with an undercover officer deployed close to the Lawrence family in August 1998.

d). What information was obtained by Mr Walton and how this was used to

influence the MPS final submission to the Stephen Lawrence Inquiry.

225. Documentary evidence that is relevant to this aspect of the investigation includes:

D89

Department of Legal Services, minutes of meeting held 08.00am, 13 August 1998

226. These are the minutes of a meeting of The Lawrence Inquiry Part 1 Submission, 08.00hrs, 13 August 1998. This is a meeting of a strategic group, chaired by Assistant Commissioner Johnston, with other senior officers present and representatives from the MPS Solicitors Department and Counsel. The minutes suggest this meeting was to discuss the preparation of the written submissions to the Inquiry.
227. The minutes suggest the discussion focussed on themes for the oral submissions of:
- Race/Corruption/Re-iteration of an apology
228. A suggestion from Lead Counsel is that the oral submissions should focus on the following areas:
- Race/Corruption/The Way Forward.
229. Lead Counsel is also recorded as commenting;
- 'Race – NSY submission is excellent.'*
230. Richard Walton is not recorded as being at this meeting.

D92

Department of Legal Services, minutes of a meeting held at 09.30am, 13 August 1998

231. This appears to be a follow-on meeting from the above, in the same room. Counsel are present, Superintendent Quick and DS Sutherland, who had all been at the previous meeting, but significantly, A/DI Richard Walton was also now present.
232. The minutes suggest this meeting focussed on agreeing a structure for the submissions and records that Superintendent Quick talked about the three areas of: Race/Corruption/Competence.
233. A/DI Richard Walton was not noted as speaking at any stage in the meeting but was recorded as being present. There is nothing in the minute to suggest that A/DI Walton was not performing a role on the Stephen Lawrence Review Team.

D188

Department of Legal Services, minutes of a meeting held at 4pm, 07 August 1998 (from Ellison Team)

234. These are minutes of an earlier meeting, of the group present at the meeting described at paragraph 215. Richard Walton was present at this meeting.
235. The minutes again reflect a debate at a strategic level as to the approach with the oral and written submissions still to be made to the Inquiry.

Metropolitan Police Service Submission to Part 1 of the Inquiry into the Matters Arising from the Death of Stephen Lawrence (September 1998) Chapters 15 and 19 – Race and Issues of Race.

236. This document contained the two chapters that Richard Walton drafted for the SLRT. Chapter 15 was entitled Race and Chapter 19 was entitled Issues of Race. The content of the two chapters are discussed in the Analysis section of this part of this report.

IPCC Subject Interview

Richard Walton

237. Commander Walton was interviewed on Friday 19 December 2014, when he answered all questions put to him.
238. Richard Walton began the interview with the IPCC by stating that to date he had been interviewed twice by the Ellison Review, he had now read the Operation Herne and Ellison reports. He wanted to co-operate fully with the IPCC Independent investigation.
239. He stated that he was trying to put forward an accurate account, but he could not now be sure of what he could properly recall or what he was now re-constructing in his mind having other information available to him. He was asked to comment by the Ellison Review on documents that he had not previously seen. He believed that he had acted with integrity throughout.
240. Richard Walton recalled conversations with Robert Lambert and Colin Black but could not recall when they occurred. He believed that he may have got these the wrong way around in his initial interview with the Ellison Review.
241. Richard Walton described himself as being the 'expert on Race issues' within SLRT. There had been some public order issues at times during the public parts of the Inquiry. Richard Walton stated that that was the context of the time when he had the meeting with Robert Lambert. He believed that there was a public order, public disorder remit and they were the grounds for the meeting.
242. Richard Walton stated '*The precise reason for the meeting, I don't think I have any recollection of it being explained to me as such, but I was familiar with Special Branch work, I understood their remit...to gather intelligence on threats to public order*'.
243. He stated that he responded to a request from Robert Lambert to meet the undercover officer, and this was in a context of race, community disorder, and community tension.
244. Richard Walton that he could not recall the content of the conversation with Robert Lambert. It was a request from a more senior officer to attend the meeting, it was not Richard Walton's idea.
245. He could not recall where the meeting with Robert Lambert took place, but from his perspective, it was a 'chance' meeting. His best recollection was that the meeting was in the foyer at New Scotland Yard.
- Y1d 246. Richard Walton was asked to provide detail of the conversation he had with Robert Lambert. He referred to a page of his initial interview with the Ellison Review to provide his best recollection of the meeting and what was said. He

stated in that interview, Robert Lambert said *"Well if it helps, do you want to..would it help to meet the actual officer"*, and Richard Walton replied, *"...It would allow me to contextualise ...what is going on out there...we are getting all sorts of feeds.."*

247. He could not recall any other conversations with Robert Lambert to make any arrangements to put the meeting in place. He could not recall the timing of the meeting with Colin Black. Richard Walton was adamant that Robert Lambert instigated the meeting.
248. Richard Walton stated that he had met with other undercover officers during his time on Special Branch, so this was not unusual for him and not a unique situation. It was pointed out to Richard Walton that he was in a different role on the SLRT in comparison to his Special Branch role, which he agreed with.
249. He could not give any detail or the rationale for the meeting. He had no memory other than what he had given. At no stage did Richard Walton think the meeting was inappropriate, before, during, after or now.
250. Richard Walton referred to his first Ellison Review interview again (page 15) where he recalled a conversation with Colin Black, which included *'..well you are on the Lawrence Review Team, we have got some coverage around the periphery of the Lawrence family'*, he also spoke about a conduit for intelligence on the back of the Lawrence Inquiry. Richard Walton felt this referred to his later CO24 remit. He could not say when the conversation with Colin Black took place. He could only be certain that he had at least one conversation with Robert Lambert and at least one conversation with Colin Black.
251. Richard Walton pointed out that he did put caveats into his conversations with the Ellison Review, such as *'to the best of my knowledge'*, he could have said that he did not recall, but he was trying to be helpful.
252. Richard Walton was asked if the meeting with the undercover officer was *'secret'*. He said that it was secret in that it was arranged through Special Branch protocols and he would have understood this to be secret, but he pointed out that this did not make it illegitimate. He again pointed out that he was responding to a request from a senior officer, in the context that he has given, and nothing that he heard made him think the meeting was in any way illegitimate.
- D12 253. He again referred to Ellison Review findings which stated, *'... accept that the meeting was not his idea, but a request from a more senior officer at the SDS. We also accept that he agreed to a meeting without any detailed knowledge of the actual role and intelligence covered by an undercover officer...we accept that Mr Walton may have simply taken up the invitation without realising that he was going to meet an undercover officer who was positioned close to the Lawrence family'*. Richard Walton agreed with this finding.
254. He had very little recollection of anything at the meeting. Most of his recollection was reconstruction from the notes provided. He could not recall anything about the officer. His mindset in going into that meeting was about moving forward and he stated the issues in the Robert Lambert file note were CO24 matters.
255. Richard Walton stated that he had a meeting with John Grieve, which he believed to be about that time but he could not recall the exact date.
256. In interview there was a discussion of when Richard Walton was posted from the

- D179
D53
- SLRT to CO24. He stated entries in his Personnel Record suggested this to be around 10th to 18th August 1998. It was put to Richard Walton that a different interpretation of his Personnel Record was that the transfer took place on 05 October 1998, which is recorded in the document. Richard Walton pointed out that there are inaccuracies within MPS personnel records. Richard Walton emphasised that his work on the submissions had finished. Richard Walton believed he could have been in CO24 at the time of this meeting.
257. Richard Walton did not make any notes at the meeting with the undercover officer. He had never seen the file note before the first interview with the Ellison Review and then was shown a (slightly) different note in the second interview.
258. Richard Walton's view of the file note was that it was an 'embellished' version of events, and stated Robert Lambert was known to be 'poetic'. He was asked to provide a view on how accurate the file note was and he replied that he could not say because he did not remember it. It was not a totally fabricated note.
259. Richard Walton highlighted some differences in the documents made available to him during interview, which 'perplexed' him. He stated that N81 was referred to as N81, and himself as [REDACTED]. The second document includes the line '*An excellent meeting and a good example of the strides N81 has made over the last 12 months*', which is not included in the first document.
260. Richard Walton stated that he was perplexed and confused by being told there was a spy in the camp and then being shown a different document.
261. Richard Walton stated that he disagreed with the Ellison Review assertion that the meeting with the undercover officer was put in place to inform the MPS submission. Richard Walton did not accept this assertion.
262. He felt that the issues in the points raised in the meeting with the undercover officer were more CO24 issues. He adamantly refuted the suggestion that the meeting was put in place to assist the submissions, he stated that the content was more about 'moving forward'. He repeated this point a number of times.
263. It was pointed out to Richard Walton that Robert Lambert got the information that Richard Walton 'prepares to draft the final submissions' from somewhere and the only person this could have come from was Richard Walton. Richard Walton maintained that the Robert Lambert file note was embellished but was essentially accurate in terms of the information it contained.
264. Richard Walton was questioned about the Colin Black file note which referred to 'ad hoc meetings'. Richard Walton maintained there was only one briefing, and that was on 14 August 1998.
265. Richard Walton was asked if he briefed anyone on the content of the meeting, and he stated that he could not recall if he did or he did not.
266. He stated his role was not to route intelligence. That would go through existing channels. Richard Walton was outside that chain of intelligence. The conversation was about race and this, in his view, was not an illegitimate conversation. Richard Walton felt it was reasonable to receive a briefing on how race issues were playing out in South London, at that time. However, Richard Walton could not recall if this was the purpose of the meeting.
267. There was a discussion about the legitimacy and appropriateness of the

meeting. Richard Walton stated that he responded to a request to go to a meeting by a senior officer. In his view, the legitimacy of the meeting was not his responsibility, but that of the senior officer who invited him to the meeting. He stated that had heard nothing since, other than the spy in the camp allegations (which he stated we now know there was not), which suggested the meeting was inappropriate. He stated if he was in that same situation he would still go to that meeting.

268. There was further discussion of the sensitivity of the meeting at the time of the submissions and his role in preparing the submissions. There was also no disclosure of the meeting having taken place. Richard Walton stated he had already told the Ellison Review that disclosure of the meeting was not his responsibility as he was a junior officer at the time. This was a matter for Special Branch senior officers.

269. Richard Walton could not recall if he told anyone about the meeting. If this was secret, it was about the risk to the undercover officer rather than any other reason. It was pointed out that the meeting was reported through the SDS channels, but did not appear to have been reported through the SLRT end. Richard Walton pointed out that Special Branch could use their own systems to report the meeting if it was classified as secret.

270. Richard Walton reflected on the content of the file note and stated that he felt that the information flow was more from him to the undercover officer, so he questioned for whose benefit the meeting was arranged. This was a reflection now and not a recollection of the event.

271. Richard Walton clarified the accuracy of his response to the Ellison Review in that he had said he had gone from Stoke Newington to the SLRT but now he could see from his Personnel File that he went to Special Branch, then to the SLRT. This was a mistake. Richard Walton felt the Personnel File clarified for him that his mindset in attending the meeting was about his CO24 role, not his SLRT role.

D92

272. The Meeting Minute of 13 August 1998 showed Richard Walton attended this meeting. Richard Walton stated this did not prove he was on the SLRT, he may have been there from CO24. It was pointed out that the note did not identify where others were from, and all were on the SLRT. The minute did note that *'Race submission is excellent, Counsel only need to add a small factual input'*. Richard Walton suggested this meant his submission had been completed. Richard Walton suggested that the Ellison Review interpretation of this minute and that of meeting on 07 August 1998, showed that the race submission was complete. Richard Walton could not recall anything about either meeting.

D56

273. There was a discussion about a document 'Police Transfer Form' (from Personnel File). Richard Walton had completed this form and had put himself as transferring to CO24 on 01 October 1998. Richard Walton made the same point about the inaccuracy of this information, as it was based on budget transfers and completed without access to Personnel File information. Richard Walton stated that none of these files were accurate. It was pointed out that in none of the files whether accurate or not, was he put as being on CO24 in August 1998.

D151

274. Richard Walton produced a number of documents and articles during his interview which he stated added context to the situation and why he attended

this meeting.

D63

275. Richard Walton referred to the Operation Herne Report. This report referred to the tasking of N81. He stated that this report found that N81 was not tasked into the Lawrence family, there was no evidence N81 met the Lawrence family, there was no evidence any officer was targeted to the Stephen Lawrence Campaign. Richard Walton stated that the public would expect undercover officers to be tasked to violent organisations.

Analysis of the evidence

276. In order to reach conclusions it was necessary for me to analyse and evaluate the evidence. Where I have needed to make factual findings I have applied the “balance of probabilities” standard of proof. In deciding whether something is more likely than not to have occurred, I have had regard to all of the available evidence and the weight to be attached to it.
277. Since this case was one subject to special requirements I am required only to form an opinion about whether there is a case to answer for misconduct or gross misconduct for each subject. In doing so I will not reach findings of fact that would be conclusive of misconduct or gross misconduct which may take place – these findings should be left for any subsequent misconduct hearing or meeting.
278. Richard Walton began his interview with the IPCC by stating that he had been interviewed by the Ellison Review twice and he had now read the Operation Herne Report and the Ellison Review Report. He was trying to put forward an accurate account, but he was now unable to say what he could properly remember or what he was reconstructing in his mind, having the other information available to him. He was satisfied that he had acted with integrity throughout.
279. Richard Walton had been seconded to the SLRT from his role in Special Branch. He had been in the SLRT role for some months and was responsible for completing the MPS submissions on race. He considered himself to be the ‘expert on race issues’ on the SLRT.
280. He stated his recollection of the arrangements to put the meeting in place was poor. However, he recalled that the meeting was initiated from an approach by Robert Lambert, he believed as part of a chance meeting, possibly in the foyer at New Scotland Yard. His best recollection of the conversation with Lambert included the following;
- ‘Well if it helps, do you want to...would it help to meet the actual officer’, to which he responds:*
- ‘...it would allow me to contextualise...what is going on out there...we are getting all sort of feeds..’*
281. Richard Walton placed the context of the meeting in terms of race, community disorder and community tension. He recalled a conversation with Colin Black in which the phrase:
- ‘..coverage around the periphery of the Lawrence family’* is used, the conversation also included discussion of the conduit for intelligence on the back

of the Lawrence Inquiry, which led into the CO24 remit. Richard Walton could not be precise on when the two conversations took place, or which was the first conversation. He accepted that he may have mixed up the timing of the two conversations.

282. Robert Lambert did not provide any detail of the conversation with Richard Walton, but the conversation must have taken place. Both Robert Lambert and Richard Walton suggested an element of chance in the meeting between them, which did not accord with either suggesting that the idea for the meeting with N81 came from the other department or function.
283. Whilst there was no recollection of the conversations from either Colin Black or Robert Lambert, the knowledge of N81's deployment and N81's tasking, sat within the SDS. Robert Lambert was unable to recall who tasked him with arranging the meeting, but he stated the request came from his (SDS) senior management. He agreed that there was contact with Richard Walton to set up the meeting.
284. I consider that it is more likely than not that the meeting was initiated by the SDS side. While there is no direct evidence that the knowledge of the detail of Richard Walton's role was available to the SDS, I consider, on the balance of probabilities that an approach was made to Richard Walton by Robert Lambert.
285. Richard Walton stated that the approach to him was by a more senior officer – a detective inspector – when Richard Walton was an acting detective inspector, effectively a sergeant. This implies that Richard Walton could not refuse the request, albeit he does clarify that he was not 'ordered' to attend the meeting.
286. Richard Walton could not now provide an accurate rationale as to why he attended the meeting with N81. He spoke about the context of the meeting being about race, community disorder and community tension, but the focus of his work at that precise time then becomes relevant. Richard Walton stated that at the time of the meeting he was 'transitioning' from the SLRT to a role in CO24. This was discussed at length in interviews with both the Ellison Review and the IPCC.
287. In the IPCC interviews, parts of Richard Walton's Personnel File were discussed. A memo entitled Accelerated Promotion Course (APC) Phase III (Inspectors) dated 06 August 1998, has an entry dated in August 1998, as follows:
'DS Walton currently on Lawrence Enquiry. Spoke to Bob Quick D/Supt + Richard Walton. Orig (sic) intention to transfer to 2Area, but Mr Grieve wants him to stay & join new Race Hate Unit (under Mr O'Connor 5 Area A CO24'
288. The date of this entry on the memo cannot be clearly read, it is possibly 10 August. The next entry is then dated 19 August 1998, which says:
'Copy of letter sent to DS Walton (Room 1036 NSY). He will try to find out who is dealing with their personnel & let me know'.
289. Entry dated 20 August 1998:
'CO20 deal with Personnel for CO24'
290. Entry dated 09 October 1998:
'DS Walton transferred to CO24 5/10/98 as Insp. Send file to Room 506 NSY'

D53

- D56 291. Richard Walton's interpretation of these documents is that they demonstrate that he transferred from the SLRT to CO24 between 10 and 18 August 1998. So at the time of the meeting with N81, he may not have been part of the SLRT.
- D55 292. However, the document mentioned above clearly stated that '*DS Walton transferred to CO24 5/10/98...*'. Other documentation discussed in interview was a 'Police Transfer Form' which is initially completed by the officer in question. Richard Walton has stated on this form that he was posted to CO24 on 01.10.98 until 18.4.99 – this form was completed on 03 July 2003. A further document referred to is a Career Management Transfer Form' again completed by the officer in question, and which states that Richard Walton was posted to CO24 from '*Dec '98 to Jan'98*', but must refer to 1999. This form lists the secondment to the SLRT (itemised as Lawrence Review Team) from June '98 to Dec '98. This form indicated 'Date of Joining OCU – December 1998', 'Present OCU – CO24 (Racial and Violent Crime Task Force)'.
293. Richard Walton pointed out that Personnel records are inaccurate, in that formal transfer of personnel on a specific date will be confirmed when budget arrangements are in place and an individual is then paid from a specific department's budget. However, it was pointed out to Richard Walton, that when he had the opportunity on the Police Transfer Form and the Career Management Form to identify the date of this transfer to CO24 on neither occasion did he choose to include a date in August 1998. He chose the date of 01 October 1998 or later.
294. It is more likely than not that between 10 and 19 August, Richard Walton was aware that his future lay in CO24, however, on 13 August 1998, two meetings were held at New Scotland Yard, the first beginning at 08.00am (The Lawrence Inquiry Part 1 Submission minutes). Richard Walton was not present for this meeting. A second meeting was held which began at 09.30am, that same day and in the same room, (The Lawrence Inquiry Part 1 Submission minutes), for which Richard Walton was present. In interview with the IPCC, Richard Walton stated that his presence at this meeting did not indicate that he was still part of the SLRT as he may have been there in his CO24 role. The evidence suggested, that it is more likely than not that Richard Walton was present at that meeting because of his SLRT role.
295. It is more likely than not that at the time of the meeting with N81, Richard Walton's role was on the SLRT.
296. In the earlier meeting that day, Jeremy Gompertz, QC, was noted as saying:
'Race-NSY submission is excellent. Counsel need only add a small factual input e.g. RIU at Plumstead'
297. This is strong evidence to support Richard Walton's position when he stated that his race submission was complete. Without direct recollection, he also felt that his mindset in going into the meeting with N81, was about the issues coming out of the SLRT and moving forward, so essentially more CO24 issues rather than SLRT. Richard Walton stated that he felt it was reasonable for him to receive a briefing on how race issues '*were playing out in South London*'. However, he could not recall if this was the purpose of the meeting.
298. Richard Walton could not recall telling anyone that he attended the meeting. There is no evidence from any officer on the SLRT side that they were aware of

the meeting, even after it had taken place.

299. It is more likely than not that Richard Walton was in the position of being asked to attend this meeting because of his role on the Stephen Lawrence Review Team. It is more likely than not that Richard Walton was aware of this and made a decision that he would attend the meeting.
300. As far as it is possible to say, he did not discuss this request with anyone from the SLRT. It is more likely than not that Richard Walton was aware that the remit of SDS undercover officers was around intelligence on public order issues. Richard Walton had worked on Special Branch until just a couple of months before this encounter. In his Special Branch role, it was not unusual for him to meet with undercover officers on tasking issues.
301. However, Richard Walton was no longer in a Special Branch role, he was not directly involved in an intelligence gathering role. There were legitimate intelligence routes for public order intelligence to be passed from N81 to N81's handlers. Richard Walton's presence at the meeting with N81 fell outside of the remit of the undercover officer and, it is more likely than not, fell outside of Richard Walton's remit within the SLRT.
302. Richard Walton pointed out that intelligence from undercover officers, such as N81, and other sources of intelligence, was passing through normal intelligence routes. Some of this intelligence, if gathered at meetings similar to those attended by N81 with N81's interest group, would contain intelligence relating to the Lawrence campaign.
303. Richard Walton's role on the SLRT, at that time, was not an intelligence gathering role. Intelligence gathered by N81 as part of N81's tasking had legitimate routes that it could be passed through.
304. Richard Walton was responsible for drafting the race aspect of the MPS submission. In the final submission document this covers two chapters:
Chapter 15 – Race
Chapter 19 – Issues of Race
305. Richard Walton has maintained throughout all interviews that he had completed the draft of the race submission prior to attending the meeting with N81. This is supported by the minutes of the meeting of the Lawrence Inquiry Part 1 Submission team held at 08.00am on 13 August 1998. The minutes note:
'Race - NSY submission is excellent. Counsel need only add a small factual input e.g. RIU at Plumstead'.
306. The file note prepared by Robert Lambert following the meeting referred to Walton as he *'..continued to prepare a draft submission to the enquiry'*. The note then identified the three areas that the SLRT were addressing, which must be the areas identified by Walton:
1. How to respond to the charge of Institutional Racism
307. The chapters on Race and Issues of Race reviewed the concept of Institutional Racism and included sections contributed to by outside observers of the situation within MPS. The phrases *'racism...both conscious or unconscious'* and *'cultural insensitivity'* both appear in the submission. In the file note, Lambert referred to

‘unconscious racism’ and ‘a lack of understanding of black culture’. The file note appeared to reflect Walton putting forward these expressions.

2. How to handle the second stage of the Public Enquiry

308. This formed no part of the submission. However, N81 passed on intelligence that suggested that a particular location could be vulnerable to disruption by specific groups. This appears legitimate intelligence, in keeping with the tasking of N81 and the public order remit of officers in N81’s position. It would be legitimate for Robert Lambert to progress this intelligence. The information provided by N81 did not appear in the submission.

3. How to regain the confidence of the black community

309. The submission chapters on Race and Issues of Race were not specific on these areas, but did include;

‘The Commissioner continues to hold as a high priority the quality of police response to racial attacks and all forms of racial harassment. This extends to the recruitment and retention of ethnic minority officers.’

And ‘...the submission..has outlined many proposals for introducing change in the organisation which will radically affect the service given to victims of racial crime. The Commissioner is determined to develop an ‘anti-racist police service’ that deals effectively and expeditiously with racial crime.’

310. Both of these summarised the issue of trying to regain the trust of the black community as it was identifying the priorities of the then-Commissioner and his objectives, moving forward. The role of CO24 was not discussed in this section of the submissions or the *‘groups that may be prepared to build bridges’*. This was again information that appeared to come from the Richard Walton side to N81.

311. N81’s role involved infiltration into an ‘interest group’ and the file note recorded some discussion that *‘..enabled him (Richard Walton) to increase his understanding of the Lawrence’s relationship with the various campaigning groups..’*

312. The submission (Chapter 19 Issues of Race, para 53) makes reference to there being *‘some evidence of politically motivated groups influencing communication between police and the Lawrence family’* and includes quotes from two sources, Dev Barraah and Mrs (now Baroness) Lawrence. Both referred to potential influence by these groups in the early aftermath of Stephen’s murder.

313. In the investigator’s opinion there is insufficient evidence for a tribunal to find that Richard Walton used the information provided by N81 in the submissions made by the MPS to the MacPherson Inquiry.

Conclusions

314. Below, I have set out my conclusions for the appropriate authority and Commission to consider.

315. These conclusions are based on the evidence obtained during the investigation and summarised above.

316. If there are to be court or disciplinary proceedings it will be for the relevant

tribunal in those proceedings to make final determinations. For example, where I conclude that person subject to the investigation has a case to answer for gross misconduct, this does not amount to a legal determination that there has been gross misconduct. If a charge is then brought by the appropriate authority a misconduct hearing will hear the evidence, and make its own findings about whether the charge is proved or not.

317. I have made factual findings, where appropriate, by applying the balance of probabilities test to the evidence. In other words, I have decided whether it is more likely than not that the fact alleged occurred.
318. After reviewing my report and considering my recommendations, the Commission will decide whether any organisational learning has been identified that should be shared with the organisation in question. They may also recommend or direct, unsatisfactory performance procedures.
319. The Ellison Review suggested that N81 was tasked into a group that was close to the Lawrence Family Campaign and used the term 'spy in the camp'. The review undertaken by Operation Herne, found that N81 was tasked into an interest group. As part of that group's activities N81 attended public meetings which involved some discussion of aspects of the Lawrence campaign. Operation Herne concluded that there was no evidence found that N81 was tasked to infiltrate the Stephen Lawrence family or any other family campaigning for justice. N81's focus was on their target group. This position is supported in N81's witness statement.
320. However, the true nature of N81's tasking is not in question when considering the potential impact of Richard Walton in his SLRT role attending this meeting. N81 said that N81 had no information that N81 could have passed to Richard Walton about the Lawrence family campaign.
321. There is no evidence Richard Walton sought permission or advice from any senior officer on the SLRT about attending the meeting. Both Lord Condon and Lord John Stevens have said that using intelligence from undercover officers to inform the MPS response was unjustified and unacceptable.
322. There is evidence Richard Walton had completed the drafts of his submissions on race and issues of race by the time of the meeting on 14 August 1998, but also that it was not too late to change them, as the potential for changes (by Counsel) had been discussed in the meeting on 13 August. Similarly, although the setting up of a channel from SDS to CO24 following the meeting supports the suggestion that it may have been arranged in contemplation of his new role, he was still involved with the SLRT and so information from N81 could have been passed to it. For the MPS to be brought into disrepute, it does not require proof that the submissions were changed or that the meeting was solely to do with Richard Walton's role on the SLRT. It is the perception that the MPS could use that information to gain advantage in preparing its submissions to the MacPherson Inquiry that, as identified by the Ellison Review, was reasonably likely to have brought the MPS's reputation into disrepute. Therefore, a reasonable misconduct panel or meeting, properly directed could find that on the balance of probabilities Richard Walton has breached the Discipline Code by attending this meeting.
323. As set out above, the evidence is that Richard Walton was asked to attend the

meeting by a more senior officer, from Special Branch, rather than him instigating it. Also, that he at least had in mind his future role in CO24 in connection with which, receipt of N81's intelligence may have been legitimate. For these reasons it is the investigator's opinion that if found proved a breach of the discipline code would not be so serious that dismissal was justified.

324. **For the above reasons it is the investigator's opinion that Richard Walton has a case to answer for misconduct.**

Terms of Reference 1:

e). What information was provided by Commander Richard Walton during interview to the Review (The Ellison Review) in October 2013, and the reasons for any discrepancies in his evidence when interviewed in February 2014.

The concerns raised by the Ellison Review in respect of the changed recollection of Richard Walton, were included at paragraph 55 of this report, but are repeated for context.

325. The Ellison Review summarises Richard Walton's position in respect of the meeting with N81 as '*...less than straightforward to establish and somewhat troubling*'. The Review then identifies a number of areas where Richard Walton's answers caused concern:

- In October 2013, Walton largely signed up to the accuracy of the SDS documents created close to the time of the meeting. Producing narrative answers to questions such as 'How did the meeting come about?' He provided detailed answers on how the meeting with N81 was relevant to his work on the SLRT and the justification on a public order basis.
- After notification of potential criticism, Walton was interviewed again in February 2014. He said that what he had said in October 2013 had been wrong, he had tried to be helpful and had accepted the accuracy of the notes that he had been presented with, but he had no recollection of events. Walton now firmly believed that he had been working within his CO24 role and was no longer on the SLRT. He challenged the accuracy of the SDS file note.
- The ER found the file note to be a more accurate version of the events at that meeting, having been written just days after the meeting.
- N81's proximity to the Lawrence family campaign and N81's intelligence was the background to any insight he could offer.
- In October 2013, Walton agreed with the file note. The Ellison Review found it difficult to understand how a senior officer would profess to have had his memory refreshed by the SDS file note and give detailed narrative answers about the arrangements and content of the meeting and the consistency with his SLRT role.
- As well as agreeing, he then challenged some of the detail, such as he had not raised the black community and the black churches with N81. This suggested he did have some recollection of the meeting. He stated he had no recall of the correspondence route set up with CO24.
- Walton attended a meeting of the Lawrence Inquiry Part 1 Submission Team on 13 August 1998, in which the submission that he had prepared had been discussed.
- Mr Grieve believed Walton was still working to Bob Quick (SLRT) at the time of

- the meeting.
- There was no clear indicator of when Walton left the SLRT. Walton believed he was 'transitioning'
- The Ellison Review found Richard Walton's changed recollection to be unconvincing.

IPCC Subject Interview – Richard Walton

326. This aspect of the investigation was also covered in the interviews with Richard Walton. It was discussed with Richard Walton that in the first interview he had a conversation with Colin Black in which he was asked if he was comfortable receiving intelligence relating to SDS. Richard Walton said that he was. He was asked if he was comfortable receiving intelligence and he stated that this was taken out of context. He was 'not uncomfortable' receiving the intelligence relating to the Lambeth situation. But throughout his answers he included a caveat that *'...I'm trying to be helpful and to recollect..'*
327. It was then discussed with Richard Walton that in the first interview, when he spoke about the chance meeting with Robert Lambert he recalled some of the conversation, for example *'...would it help to meet the actual operative in the field?'* and he replied *'Yes Bob, I think that would help because it would allow me to contextualise what is actually going on out there because we're getting all sorts of feeds and to speak to a person actually in the field would probably be as good as it gets'*.
328. Richard Walton pointed out that *'...15 years later, I'm not disputing that it's 15 years later being shown for the first time 15 years so I'm trying to recollect what happened in this account'*.
329. In the second interview he stated that someone else was putting him in that position, he agreed that he was not ordered to go, but as part of a hierarchical structure, he could not easily say no.
330. In the second interview, Richard Walton said that he was wrong about the conversation with Colin Black. Richard Walton now said that he could not distinguish between the conversation he had with Colin Black or Robert Lambert.
331. He had initially said that he did receive intelligence, but clarified that this was within his CO24 role. Richard Walton also stated that he did say that he could not remember if he did receive any intelligence.
332. In his first interview Richard Walton said the meeting was helpful. In the second interview he stated that he could not really remember it being invaluable. Richard Walton now stated that he did not recall much of the meeting. He could only speculate that if it had been significant, he would have remembered more of it.
333. On the Robert Lambert file note and the Colin Black note, in the first interview, Richard Walton accepted the document *'I don't dispute this document, It's pretty much as I recall'*. But then in the second interview he did dispute the document and specifically the mention of off-the-record briefings, he did not recall the meeting being *'fascinating and valuable'*.
334. Richard Walton stated that he felt he was being criticised for responding to the Ellison Review by trying correct incorrect criticisms and possible incorrect conclusions. Richard Walton suggested that the Ellison Review wrote to him,

with an opportunity to respond and to clarify matters, inviting representations, but he stated that when he did provide representations he was then criticised for it.

335. It was put to Richard Walton that the criticism came from his change of recollection and he stated;

‘..I go from thinking, it’s a bit strong to embellished, I’m seeing it for the first time 15 years later, the first interview. The second interview I’ve got a different version, but I’ve had time to think about it...my changes of recollection are, I think fairly minor and are based on my thinking through stuff, seeing additional material, having time to pause and look at the detail in a proper manner and not live in interview...’

336. The difference in where he said he was working was discussed. Initially he had said he was on the SLRT or about to be on CO24, but in the second interview he was more definite that he was on CO24, and certainly from his mindset in attending the meeting he stated he was on CO24. Richard Walton stated that his position here had only changed marginally and he stated that the Personnel File documentation supported his position.
337. Richard Walton emphasised that he was trying to assist the Ellison Review, and stated that a changed recollection was not an ethical or breach of disciplinary regulations. He now regretted that he did not seek legal advice before the interviews. He described changes as minor and slight nuances of change. He stated that he had been *‘honourable and tried to tell the truth the best I could and ..I’ve been heavily criticised for it’*.

Analysis of the evidence

338. In order to reach conclusions it was necessary for me to analyse and evaluate the evidence. Where I have needed to make factual findings I have applied the “balance of probabilities” standard of proof. In deciding whether something is more likely than not to have occurred, I have had regard to all of the available evidence and the weight to be attached to it.
339. Since this case was one subject to special requirements I am required only to form an opinion about whether there is a case to answer for misconduct or gross misconduct for each subject. In doing so I will not reach findings of fact that would be conclusive of misconduct or gross misconduct which may take place – these findings should be left for any subsequent misconduct hearing or meeting.
340. Richard Walton began his first interview with the IPCC by stating that he had been interviewed by the Ellison Review twice and he had now read the Operation Herne Report and the Ellison Review Report. He was trying to put forward an accurate account, but he was now unable to say what he could properly remember or what he was reconstructing in his mind, having the other information available to him. He was satisfied that he had acted with integrity throughout.
341. Richard Walton began his interview with the IPCC in December 2014 by stating the above, but the differences in his responses in the two Ellison Review interviews were discussed with him in the interview.
342. Richard Walton stated that he could not remember the timing of the two conversations with Robert Lambert and Colin Black and may have got the order

of the conversations mixed up. However, in his first interview he provided details of the conversation in respect of how and why the meeting was arranged, but in the second interview he stated that he may have been put in the position of attending the meeting. Richard Walton felt that the detail of the conversation with Colin Black about him being on the SLRT was an incorrect recollection.

343. In the first interview Richard Walton agreed with the content of the file note as being an accurate record of the meeting, yet in the second interview he disputed the accuracy of the document, particularly in respect of 'off the record briefings', as this was the only briefing he received. He was now suspicious of the language, did not recall the meeting being 'fascinating and valuable' and could not have thanked the officer for his 'invaluable reporting' as he had never seen any other intelligence from this officer, and was not aware of the group he had infiltrated.
344. Richard Walton stated that he was being criticised in the Ellison Review for trying to correct '*incorrect possible criticisms and incorrect conclusions*'. He stated that the Robert Lambert file note was shown to him for the first time in the first Ellison Review interview, yet he was shown a slightly different version of this note in the second Ellison Review interview. Richard Walton stated that the changes that he had introduced into his account were fairly minor and this was because he had seen additional material. He had, by the time of the second interview had time to look at the detail in a proper manner. He felt his only inaccuracy was his posting before the SLRT, when he had initially said he was in a divisional role, but then realised that he had been in a Special Branch role.
345. Additionally, Richard Walton said that at the time of the meeting he had been 'transitioning' from his SLRT role into CO24, but having reflected in the second interview he was now satisfied that his mindset was all about CO24 and that he had moved on from Lawrence. He felt that the content of the file note was all about the remit of CO24.
346. Richard Walton's representatives wrote to the IPCC in June 2015 and set out a number of representations on the allegations faced by Richard Walton. In respect of the allegation that Richard Walton changed his account, they raise the following:
 - The assumption that Richard Walton was working on the SLRT when he attended the meeting on 14 August 1998. The representation asserted, based on the Personnel File now available, that Richard Walton was not working on the SLRT at the time that as early as 06 August, there was discussion of his move and that plans for his formal transfer were in place between 10 and 18 August 1998. They also refer to the minutes of the meeting on 13 August (and 07 August) and feel that a different conclusion would have been drawn if these were available at the October interview with the Ellison Review..
 - The assumption that there was a 'spy in the camp' with confidential information which could inform the MPS submissions. The representations suggested that if the approach in interview had been on a more '*accurate factual footing*', Richard Walton would have been able to provide the best possible account of the meeting with N81.
 - The misunderstanding of the context of the meeting. The representations referred to the view that the meeting with N81 was '*exceptional*'. However, they made the point that there was other reporting of intelligence by N81 and others

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- on groups of the type that N81 had infiltrated.
 - Haphazard disclosure in interview. The representations suggest the Richard Walton was provided with limited disclosure of a number of documents just prior to his first Ellison Review interview and that he had insufficient time properly to consider these documents. Richard Walton was not shown any additional documents prior to the second interview, but was shown various documents *'in an informal manner'* during the interview. The different version of the same document in the second Ellison Review interview *'unsurprisingly threw Mr Walton off balance'*. They stated that Richard Walton was not provided with sufficient time to fully read the documents prior to interview.
 - Adversarial interview style. The representations suggest that the approach in the second Ellison Review interview was effectively a *'cross examination'* using leading questions, which was not appropriate in a fact finding exercise. They suggested the approach prevented Richard Walton providing his best account and contributed to his misunderstandings.
347. In assessing the information provided by Richard Walton to each interview, the fact that the events being discussed occurred some 15 years earlier cannot be overlooked. It is understandable that the events would not be clear in his mind. He was then presented with what appears to be a record of the meeting, not contemporaneous, but written just four days after, and he adopted the position where he agreed, in the main, with the content. He stated that it even triggered some recall for him and he provided some detail of conversations. The approach he took suggested that these were accurate memories of the arrangements and the meeting that took place with N81.
348. Following notification that he was likely to be criticised for his role in attending that meeting, Richard Walton was further interviewed and provided a different version of his memory. A different recollection which he said was because he had now had time to reflect on and consider in detail. Whilst he now agreed mostly with the detail in the file note, he described it as *'embellished'*.
349. In interview with the IPCC, Richard Walton was clear that he had no direct recollection of the events around the meeting in 1998. This was because of the passage of time, the fact of two interviews with the Ellison Review team, and sight of both the Ellison Review Report and the Operation Herne Report. He was now unable to say what he recollected and what he had reconstructed from other information.
350. He had put forward via his representative some reasons for the differences in his accounts which focus on the manner in which he was interviewed – the assumption that he was working on the SLRT, the assumption there was a spy in the camp, the failure to understand this meeting in context, the haphazard disclosure, and the adversarial interview style.
351. The questions put to Richard Walton to establish his role and his understanding of the role of N81 were, in the investigator's opinion, perfectly appropriate questions. The records of where Richard Walton was posted at the time are not definitive, but on the balance of probabilities, on the evidence available, it is more likely than not that Richard Walton was working on the SLRT at the time of the meeting with N81. It is also the investigator's opinion that it is more likely than not that Richard Walton was aware that his future work would be in CO24.

352. At the time of attending the interviews with the Ellison Review team, Richard Walton was a senior Metropolitan Police Officer, the Head of Counter Terrorism for the MPS. It may be that the way disclosure was handled for the interviews with the Ellison Review team was not what he expected, however, throughout he had the option to ask for a break in the interview, to allow himself time to understand the disclosure more fully. If he was unhappy with the style of questioning he had an option to ask for a break in interview or for the interview to continue at a later stage.

Conclusion

353. The assessment here is in relation to the Standards of Professional Behaviour, as identified in the Police (Conduct) Regulations 2012, Schedule 2, which defines Honesty and Integrity as 'Police Officers are honest, act with integrity and do not compromise or abuse their position.'
354. The Ellison Review found Richard Walton's changed account to be 'unconvincing'. In respect of the IPCC investigation there is evidence that the accounts in the two interviews are different. However in the investigator's opinion there is insufficient evidence, taking into account the difficulties for Richard Walton to be able to remember matters accurately from so long ago and also for any reasonable tribunal now to be able to establish the true facts from other evidence, for it to find that Richard Walton has acted without honesty or integrity.
355. **For the above reasons, it is the investigator's opinion on the basis of the evidence available, that a reasonable misconduct panel or meeting properly directed could not find on the balance of probabilities that there had been a breach of the Standard of Professional Behaviour therefore, there is no case to answer in respect of Gross Misconduct.**

Misconduct

356. For each person under investigation, I must determine whether there is a case to answer for misconduct or gross misconduct. In other words, whether there is sufficient evidence upon which a reasonable tribunal properly directed, could find, on the balance of probabilities that the conduct of the person under investigation fell below the standard of behaviour expected of them.
357. Misconduct is defined as a breach of the standards of professional behaviour.
358. Gross misconduct is a breach of the standards of professional behaviour so serious that, if proven, dismissal would be justified.
359. **On the basis of the evidence presented above it is my opinion that Robert Lambert has a case to answer for misconduct in respect of Discreditable Conduct (Arranging the meeting between N81 and Richard Walton).**
360. **On the basis of the evidence presented above it is my opinion that Colin Black has no case to answer for gross misconduct in respect of Discreditable Conduct (Arranging the meeting between N81 and Richard Walton).**
361. **On the basis of the evidence presented above it is my opinion that N35 has no case to answer for gross misconduct in respect of Discreditable Conduct (Arranging the meeting between N81 and Richard Walton).**
362. **On the basis of the evidence presented above it is my opinion that N34 has no case to answer for gross misconduct in respect of Discreditable Conduct (Arranging the meeting between N81 and Richard Walton).**
363. **On the basis of the evidence presented above it is my opinion that Richard Walton has a case to answer for misconduct in respect of Discreditable Conduct (Attending the meeting with N81).**
364. **On the basis of the evidence presented above it is my opinion that Richard Walton has no case to answer for gross misconduct in respect of Honesty and Integrity (Providing a changed recollection of events to the Ellison Review during two interviews).**

Performance

365. If disciplinary charges are not directed or brought then an appropriate authority may invoke unsatisfactory performance procedures and in some circumstances can be directed to do so. A matter should only be dealt with as either misconduct or unsatisfactory performance, not both.
366. The Commission delegate may wish to consider whether on the basis of the evidence presented above the actions of Colin Black, N35 and N34 although not amounting to a case to answer for misconduct, fell below the standard expected

and that their performance was unsatisfactory.

Provisional organisational learning recommendations

- 367. After reviewing this report, the Commission delegate will consider whether learning has been identified for any organisation involved in the investigation. If any learning is identified, the commission delegate can make organisational learning recommendations and send these to the organisations in question under separate cover.
- 368. Recommendations can include improving practice, updating policy or changes to training.
- 369. Often these recommendations and any responses to them are published on the recommendations section of the [IPCC Website](#).
- 370. The IPCC also works with a variety of stakeholders, including the Association of Chief Police Officers (ACPO) and the College of Policing to disseminate learning coming from investigations undertaken by the IPCC, and by the police service locally. We produce a regular Learning the Lessons Bulletin which is disseminated to senior officers, policy makers, managers and frontline officers and staff working across the police service. These bulletins are also available on the [IPCC website](#).
- 371. In this case, I have not identified any learning which I think the commission delegate may wish to consider.

Criminal offences

- 372. On receipt of my report, the Commission delegate must decide if there is an indication that a criminal offence may have been committed by any person under investigation.
- 373. If they decide that there is such an indication they must decide whether it is appropriate to refer the matter to the CPS.
- 374. In 1998 there was no statutory offence of police misconduct. The only potentially relevant offence is the common law offence of misconduct in a public office. To commit that offence a public officer, which includes a police officer, acting as such must misconduct himself to such a degree as to amount to an abuse of the public's trust in the officer holder, without reasonable excuse.
- 375. Case law has emphasised that the seriousness of the conduct required to commit the offence, it must be "*...an affront to the standing of the public office held. The threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder*". Additionally that the public officer must deliberately do something which is wrong, knowing it to be wrong or with reckless indifference as to whether it is wrong or not. Stupidity or lack of imagination, are not sufficient.
- 376. It follows from the above that whereas there is an objective test for whether an

offence against the Discipline Code of Discreditable Conduct has been committed, whether his or her conduct is reasonably likely to discredit the force's reputation, for there to be a criminal offence, not only does the level of misconduct have to be significantly greater but there is also subjective test. In the investigator's opinion there is no, or insufficient evidence that Richard Walton realised that attending the meeting, which had been instigated by senior officers from Special Branch, would discredit the force's reputation. It is therefore the Investigator's opinion, regardless of whether the conduct may reach the high threshold required, that there is insufficient evidence of knowledge or recklessness, for there to be an indication that the offence may have been committed.

Ellison Review – Walton, Lambert and Black

An investigation into the circumstances surrounding a meeting between A/Detective Inspector Richard Walton and an undercover officer on 14 August 1998

Independent investigation report
Appendices

Appendix 1: The role of the IPCC

The IPCC carries out its own independent investigations into complaints and incidents involving the police, HM Revenue and Customs (HMRC), the National Crime Agency (NCA) and Home Office immigration and enforcement staff when the seriousness or the public interest require it.

We are completely independent of the police and the government. IPCC commissioners by law may never have worked for the police.

All cases are overseen by a Commission delegate. Commissioners provide oversight in some of the most serious cases, providing strategic direction and scrutinising the investigation. In other cases, the Commission may delegate this role to a member of its staff.

The investigation

At the outset of an investigation a lead investigator will be appointed who will be responsible for the day to day running of the investigation. This may involve taking witness statements, interviewing subjects to the investigation, analysing CCTV footage, reviewing documents, obtaining forensic and other expert evidence, as well as liaison with the coroner, the Crown Prosecution Service (CPS) and other agencies.

They are supported by a team including other investigators, lawyers, press officers and other specialist staff.

Meaningful updates are provided to families and other stakeholders both inside and outside the IPCC at regular intervals.

Throughout the investigation, a series of reviews and quality checks will take place.

The IPCC often makes early contact with the Crown Prosecution Service (CPS) and are sometimes provided with investigative advice during the course of the investigation however we are asked by the CPS to keep any such advice confidential.

Final reports

Once the investigator has gathered the evidence they must prepare a report. The report must summarise the evidence and refer to or attach any relevant documents. If notices of investigation have been served in the course of the investigation (due to special requirements being attached to a complaint or conduct being recorded) the report must also give the investigator's opinion about whether any police officer or member of staff has a case to answer for misconduct.

The report must then be given to the Commission delegate who will decide if a criminal offence may have been committed by any of the subjects of the investigation and whether it is appropriate to refer the case to the CPS for a charging decision.

The Commission delegate will also decide whether to make individual or wider learning recommendations for the police.

Misconduct proceedings

The report must be given to the appropriate authority responsible for the subjects of the investigation, usually a chief constable. They must then inform the Commission what action they propose to take, in particular whether they will bring misconduct charges in relation to any of the police officers or staff who were subjects of the investigation. If the commission delegate is unhappy with the appropriate authority's response, the Commission has powers to recommend or ultimately direct it to bring disciplinary or unsatisfactory performance proceedings.

Criminal proceedings

If there is an indication that a criminal offence may have been committed by any subject of our investigation the IPCC may refer a subject to the Crown Prosecution Service. They will then decide whether to bring a prosecution against any person. If they decide to prosecute, and there is a not guilty plea, there may be a trial. Relevant witnesses identified during our investigation may be asked to attend the court. The court will then establish whether the defendant is guilty beyond all reasonable doubt.

Inquests

Following investigations into deaths, the IPCC's investigation report and supporting documents are usually provided to the coroner. The coroner may then hold an inquest, either alone or with a jury. This hearing is unlike a trial or tribunal. It is a fact finding forum and will not determine criminal or civil liability. A coroner might ask a selection of witnesses to give evidence at the inquest. At the end of the inquest the coroner and/or jury will decide how they think the death occurred on the basis of the evidence they have heard and seen.

Publishing the report

After all criminal proceedings relating to the investigation have concluded, and at a time when the IPCC is satisfied that any other misconduct or inquest proceedings will not be prejudiced by publication, the IPCC will publish its investigation report.

Redactions might be made to the report at this stage to ensure that individuals' personal data is sufficiently protected and occasionally for other reasons.

Appendix 2: Terms of reference



Terms of Reference

Investigation into the actions and decision making of former Detective Inspector Robert Lambert and former Commander Colin Black in arranging and Commander Richard Walton in attending a meeting in 1998 with an undercover officer deployed close to the Stephen Lawrence family and evidence subsequently provided by Richard Walton to the Stephen Lawrence Independent Review in 2013/14.

Investigation Name:	Richard Walton, Robert Lambert and Colin Black
Investigation Type:	Independent
Appropriate Authority:	Metropolitan Police Service
IPCC Reference:	2014 / 023874 and 2014 / 026749
Commissioner:	Deputy Chair Sarah Green
Lead Investigator:	Deputy Senior Investigator Steve Bimson

Summary of events

The Stephen Lawrence Independent Review (“the Review”) was published in March 2014, examining ‘Possible corruption and the role of undercover policing in the Stephen Lawrence case’. This enquiry was commissioned by the Home Secretary.

The Review makes a finding that in mid-August 1998 a meeting was arranged between an undercover officer, who was deployed into one of the groups seeking to influence the Lawrence family campaign, and (then) acting Detective Inspector Richard Walton, who was seconded to the MPS Lawrence Review Team. This team was involved in drafting the final written submission on behalf of the Commissioner of the MPS to the Stephen

Lawrence Inquiry.

The Review found that ‘..the opening of such a channel of communication at that time to have been ‘wrong-headed’ and inappropriate’. The Review stated that the meeting was ‘a completely improper use of the knowledge the MPS had gained by the deployment of this (undercover) officer’ and that such a meeting was ‘wholly inappropriate’.

Detective Inspector Lambert has stated that he was directly involved in arranging this meeting and the Review found that Commander Black, as a senior manager, was also aware of the meeting.

Mr Walton was interviewed in October 2013 about this meeting and was subsequently informed that he would be criticised in the Review report. Mr Walton was again interviewed in February 2014 when he provided a different recollection of events. The report found ‘Mr Walton’s changed recollection advanced in February 2014 about this meeting to be unconvincing’.

The actions of (now ex-) Detective Inspector Lambert and (now ex-) Commander Black in arranging this meeting in 1998 have been referred to the IPCC and are subject of this Independent investigation. The actions of Commander Walton in attending the meeting in 1998 and in providing evidence to the Review in 2013 and 2014, have also been referred to the IPCC and are subject of this Independent investigation.

Terms of Reference

1. To investigate:
 - a) *The actions and intentions of Mr Lambert and Mr Black in arranging a meeting between acting Detective Inspector Richard Walton, from the MPS Lawrence Review Team, and an undercover officer deployed close to the Lawrence family in August 1998.*
 - b) *The actions and intentions of Mr Walton in attending a meeting with an undercover officer deployed close to the Lawrence family in August 1998.*
 - c) *What other Senior Officers, if any, knew about or were involved in sanctioning the meeting and what were the circumstances and reasons for this.*
 - d) *What information was obtained by Mr Walton and how this was used to influence the MPS Final Submission to the Stephen Lawrence Inquiry.*
 - e) *What information was provided by Commander Walton during interview to the Review in October 2013 and reasons for any discrepancies in his evidence when interviewed in February 2014.*

2. To identify whether any subject of the investigation may have committed a criminal offence and, if appropriate, make early contact with the Director of Public Prosecutions (DPP). On receipt of the final report, the Commissioner shall determine whether the report should be sent to the DPP.
3. To identify whether any subject of the investigation, in the investigator's opinion, has a case to answer for misconduct or gross misconduct, or no case to answer.
4. To consider and report on whether there is organisational learning, including:
 - whether any change in policy or practice would help to prevent a recurrence of the event, incident or conduct investigated;
 - whether the incident highlights any good practice that should be shared.

The amended terms of reference were approved by IPCC Deputy Chair Sarah Green on 16 August 2014.

Appendix 3: People referred to in this report

The IPCC categorises people in three different ways:

- 377. **Subjects** of the investigation (people whose conduct was the subject of the investigation).
- 378. **Witnesses** (people who gave evidence for the investigation). This includes **significant witnesses** (people who saw or heard or otherwise witnessed a significant part of the incident).
- 379. **Experts** (people with expertise in a particular area who were instructed by the IPCC to provide their expert opinion)

Not everyone spoken to during the course of the investigation is referred to in this report. This report makes reference to the following people:

Subjects

Name	Role	Severity	Date notified	Interviewed
Richard Walton	Commander	Gross Misconduct	30 July 2014	19 December 2014
Colin Black	Ex-Chief Superintendent. MPS Special Branch	Gross Misconduct	12 August 2014	18 December 2014
Robert Lambert	Ex-Detective Inspector, Special Demonstration Squad, MPS Special Branch	Gross Misconduct	11 August 2014	16 December 2014
N35	Ex-Detective Superintendent MPS Special Branch	Gross Misconduct	12 May 2015	04 June 2015
N34	Ex-Detective Chief Inspector, Special Demonstration Squad, MPS Special Branch	Gross Misconduct	14 May 2015	24 September 2015

Appendix 4: Evidence referred to in this report

Throughout this investigation a volume of evidence was obtained and reviewed. Not all the evidence gathered during the investigation has been referred to in this report. This report makes reference to the following relevant evidence:

Ref	Details
D203	The Police (Discipline) Regulations 1985 - Reg 4 (1), Schedule 1 and - Discipline Code
D202	Extract of the Police (Conduct) Regulations 2012 - Regulation 3, Schedule 2 and - Standards of Professional Behaviour
D11	The Stephen Lawrence Independent Review: Possible corruption and the role of undercover policing Volume 1. March 2014
D172	Document 4012
D157	Extract folio 3A SDS strategy reports 1998 / 1999 - edited document (previously D1784 - ANS/34)
S2a	Statement of N81 - dated 27/08/2013
S2	Statement of N81, dated 06/10/2015, provided by Slater Gordon Solicitors.
D16	IPCC referral form. Dated 7/4/2014
D201	IPCC referral form re Robert LAMBERT and Colin BLACK, dated 07/04/2014
D63	Operation Herne Report July 2014.
D192	Letter of potential criticism from Ellison to Robert LAMBERT 20/01/2014 (but dated 2013)
D193	Response from Robert LAMBERT to Ellison
D196	Summary of criticism sent to Colin BLACK by Ellison Review
D194	Letter from Colin BLACK to Ellison, dated 03/02/2014
D195	Letter from Colin BLACK to Ellison, dated 11/02/2014
D42	Regulation 16 notice signed by Robert Lambert. Dated 11/08/14.
Y2	Interview with Robert LAMBERT, dated 16/12/2014. Transcript of disc 1
Y2a	Interview with Robert LAMBERT, dated 16/12/2014. Transcript of disc 2

D199	Regulation 16 Notice – N35 signed 12/05/2015
D155	N35 response to Reg 16, dated 12/05/2015
Y4	Interview with N35, dated 04/06/2015, Transcript of disc 1.
D200	Regulation 16 Notice sent to N34 representatives, 14/05/2015
Y5	Interview with N34, dated 24/09/2015, Transcript of disc 1
S1	Statement after caution from N34 dated 08/10/2015, following interview on 24/09/2015
D38	Regulation 16 notice signed by Richard Walton. 30/07/14.
Y1	Richard WALTON interview 19/12/2014. Transcript of disc 1
Y1a	Richard WALTON interview 19/12/2014. Transcript of disc 2
Y1b	Richard WALTON interview 19/12/2014. Transcript of disc 3
Y1c	Richard WALTON interview 19/12/2014. Transcript of disc 4
D89	Minutes of meeting 13/08/1998 - Lawrence Enquiry
D92	Minutes of meeting 13/08/1998 9.30am. Walton present in meeting
D188	Minutes of meeting 16.00 hrs, Friday 07 August 1998 of the Lawrence Inquiry Part 1 submission - supplied to IPCC by Alison MORGAN (Ellison review) on 15/12/2014
D153	MPS submission to part I of inquiry into matters arising from the death of Stephen LAWRENCE CH - 15 and CH -19 only, Sept 1998
Y1d	Transcript of Richard WALTON's police interview, dated 03/02/2014
D12	The Stephen Lawrence Independent Review: Possible corruption and the role of undercover policing Summary of Findings. March 2014.
D150	Copy of Richard WALTON's MPS Personnel file, date given 20/11/2015 Not Included
D179	Handwritten extract of annual performance review sent by WALTON representatives
D53	Memorandum regarding accelerated promotion course. Dated 6/8/1998.
D56	Police transfer form for Richard Walton. Dated 7/7/2014. No paper copy - scanned to Perito.

D151	Letter and bundle of documents presented by Emily CARTER (Solicitor) at start of interview of Richard WALTON on 19/12/2014 Not Included
D55	Career management transfer form for Richard Walton.

Ellison Review – Walton, Lambert and Black

An investigation into the circumstances surrounding a meeting between A/Detective Inspector Richard Walton and an undercover officer on 14 August 1998

Independent investigation report

Investigation information

Investigation name:	Walton, Lambert and Black
IPCC reference:	2014/023874

IPCC office:	Birmingham
Lead investigator:	Steve Bimson
Case supervisor:	
Commission delegate:	Sarah Green, Deputy Chair

Status of report:	Finalised
Date finalised:	14 January 2016

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Introduction

The purpose of this report

1. I was appointed by the IPCC to carry out an independent investigation into the circumstances of a meeting between Acting Detective Inspector Richard Walton and an undercover officer on 14 August 1998.
2. This is my report for the Commission. It summarises and evaluates the evidence, refers to relevant documents and where necessary makes factual findings. In its conclusions the lead investigator will:
 - give my opinion about whether the subjects of the investigation have a case to answer for misconduct or gross misconduct, or no case to answer.
 - identify for the Commission whether the performance of any subject of the investigation may have fallen below the standard expected of them
 - identify for the Commission any lessons which may need to be learned by any organisation related to the investigation and any recommendations which it may wish to make in consequence.
 - provide the Commission with sufficient information, and if appropriate express a view about whether it should refer any subject of the investigation to the CPS.
3. On receipt of this report, the Commission will send it to the Metropolitan Police Service as appropriate authority which must then advise the IPCC what action it will take in response to it. If the IPCC does not agree with the Metropolitan Police Service, it may make recommendations and ultimately directions about what action to take. The Commission will also decide whether to make a referral to the Crown Prosecution Service (CPS).

Background information about the Ellison Review

4. Stephen Lawrence was murdered on the evening of 22 April 1993. The circumstances of the murder and the subsequent police investigation were reviewed by the Macpherson Inquiry, which reported in 1999.
5. In 2012 the Home Secretary established an Independent Review, to be undertaken by Mark Ellison QC (The Ellison Review), amongst the Terms of Reference for the Ellison Review was:

‘What was the role of undercover policing in the Lawrence case, who ordered it

and why? Was information on the involvement of undercover police withheld from the Macpherson Inquiry, and if it had been made available what impact might that have had on the Inquiry'

6. The Ellison Review identified that a meeting had taken place on 14 August 1998, between an undercover officer and Acting Detective Inspector Richard Walton. Richard Walton was, at the time, working on the Metropolitan Police Service (MPS) Lawrence Review Team and was involved in the preparations of the MPS final submission to the Macpherson Inquiry.
7. The Ellison Review, published in March 2014, made a number of findings in respect of this meeting, and the MPS referred the conduct of officers involved to the Independent Police Complaints Commission on 07 April 2014. The matter was declared subject of an IPCC Independent Investigation on 22 May 2014

The investigation

Terms of reference

8. The terms of reference for this investigation were initially approved by IPCC Deputy Chair, Sarah Green, on 13 June 2014. The terms of reference were amended and approved on 15 September 2014. The terms of reference specific to this investigation are:
 1. To investigate
 - a) The actions and intentions of Mr Lambert and Mr Black in arranging a meeting between Acting Detective Inspector Richard Walton, from the MPS Lawrence Review Team, and an undercover officer deployed close to the Lawrence family in August 1998.
 - b) The actions and intention of Mr Walton in attending a meeting with an undercover officer deployed close to the Lawrence family in August 1998.
 - c) What other senior officers, if any, were involved in sanctioning the meeting and their reasons for doing so.
 - d) What information was obtained by Mr Walton and how this was used to influence the MPS final submission to the Stephen Lawrence Inquiry.
 - e) What information was provided by Commander Richard Walton during interview to the Review (The Ellison Review) in October 2013, and the reasons for any discrepancies in his evidence when interviewed in February 2014.
 2. To identify whether any subject of the investigation may have committed a criminal offence and, if appropriate, make early contact with the Director of Public Prosecutions (DPP). On receipt of the final report, the Commission shall determine whether the report should be sent to the DPP.

3. To identify whether any subject of the investigation, in the investigator's opinion, has a case to answer for misconduct or gross misconduct, or no case to answer.
4. To consider and report on whether there is organisational learning, including:
 - whether any change in policy or practice would help to prevent a recurrence of the event, incident or conduct investigated;
 - whether the incident highlights any good practice that should be shared.
9. Following consultation with Interested Parties, an amendment to the terms of reference was made on 15 September 2014 as follows:

1(c) was amended to:

What other senior officers, if any, knew about or were involved in sanctioning the meeting and what were the reasons and circumstances for this.

Subjects of the investigation

10. The appropriate authority referred this investigation to the IPCC because in their opinion there was an indication that the police officers listed below may have:
 - (a) committed a criminal offence, or
 - (b) behaved in a manner which would justify the bringing of disciplinary proceedings
11. Any police officer whose conduct is under investigation is categorised as a subject of the investigation. A notice of investigation must be served on all subjects, informing them of the allegations against them.
12. They must also be informed of the severity of the allegations. In other words whether if proven they would amount to misconduct or gross misconduct.
13. The following people have been categorised as subjects of this investigation:

Name	Role	Severity	Date notified	Interviewed
Richard Walton	Commander	Gross Misconduct	30 July 2014	19 December 2014
Colin Black	Ex-Chief Superintendent MPS Special	Gross Misconduct	12 August 2014	18 December 2014

	Branch			
Robert Lambert	Ex-Detective Inspector, Special Demonstration Squad, MPS Special Branch	Gross Misconduct	11 August 2014	16 December 2014
N35	Ex-Detective Superintendent MPS Special Branch	Gross Misconduct	12 May 2015	04 June 2015
N34	Ex-Detective Chief Inspector, Special Demonstration Squad, MPS Special Branch	Gross Misconduct	14 May 2015	24 September 2015

Policies, procedures and legislation considered

14. The Standards of Professional Behaviour were examined in relation to this incident, in order to ascertain whether they were complied with. The Standards for the two dates of this incident were examined, those in place at the time of the meeting in 1998 and those in place when Richard Walton was interviewed by the Ellison Review. The details of the standards are as follows.

15. The Police (Discipline) Regulations 1985.

D203

Regulation 4(1), Schedule 1, sets out the Discipline Code, which identifies Discreditable Conduct as:

'...offence is committed where a member of a police force acts in a disorderly manner or any manner prejudicial to discipline or reasonably likely to bring discredit on the reputation of the force or of the police service'.

D202

16. The Police (Conduct) Regulations 2012

Regulation 3, Schedule 2, sets out the Standards of Professional Behaviour. It identifies:

Honesty and Integrity as:

'Police officers are honest, act with integrity and do no compromise or abuse their position'.

Discreditable Conduct as:

'Police officers behave in a manner which does not discredit the police service or undermine public confidence in it, whether on or off duty'.

Summary of the evidence

17. During this investigation a volume of evidence was gathered. After thorough analysis of all the evidence, I have selected the evidence I think is relevant and answers the terms of reference for my investigation. As such, not all the evidence gathered in the investigation is referred to in this report.

The details of people referred to in this report are included in the attached appendices.

Information from Ellison Review

- D11 18. The Ellison Review reported in March 2014. This review had a wide remit of reporting on 'Possible corruption and the role of undercover policing in the Stephen Lawrence case'. As part of the review, evidence was taken from N37, a police officer who had worked as an undercover officer and who provided evidence that his tasking was to obtain information to 'smear' the Lawrence family campaign.
19. N37 was, at the time of his deployment, part of the Metropolitan Police Service Special Demonstration Squad (SDS). He was among a number of ex-SDS officers who were interviewed by the review, evidencing their role in the management of undercover officers and as frontline undercover officers.
20. One of those officers, N81, provided evidence to the review on the tasking that they were working towards. The Ellison Review stated;
- 'We are satisfied that N81's undercover deployment was consequent upon the primary 'public order' remit of SDS's work. Like other deployments in the squad, it was a case of devising a means of entry to a group with potential for fomenting or participating in public disorder; and an organic deployment thereafter, including, where appropriate, moving from one group to another.*
- N81 was well-placed in one of the groups that associated itself with, and tried to build relations with, both the Lawrence family and other groups during the Public Inquiry. N81 is adamant that there was no tasking at any stage into the Stephen Lawrence family campaign, but it is clear to us that N81's reporting nevertheless touched on the Lawrence family and its campaign'.*
21. The Ellison Review goes on to make a finding in relation to the work of N81 and their deployment as follows (p-227):
- 'The fact that the SDS had an undercover deployment in a group that got close to the Lawrence family campaign, at the centre of which was a family grieving over a murdered son and alleging inadequacy in the MPS response to that murder at a contentious Public Inquiry, should, in our assessment, have raised concerns in the SDS management and led to a careful consideration of:*
- *Whether it was proportionate and appropriate for that undercover deployment to continue whilst the Public Inquiry was in progress; and*

- *Whether those dealing with the Public Inquiry on behalf of the MPS should be informed of the situation, with a view to giving advice as to whether any disclosure might be required to the Inquiry Chairman.*

It does not appear that any such consideration was given to these factors by the SDS management'.

- D172 22. During the course of the work of the Ellison Review, a file note was uncovered, dated 18 August 1998, which referred to a meeting having taken place on 14 August 1998, between N81 and Acting Detective Inspector Richard Walton. Detective Inspector Robert Lambert, a member of the management team within SDS, was also present and produced the file note.
23. The key parts of this file note are as follows:
- 'It was a fascinating and valuable exchange of information concerning an issue which, according to DI Walton, continues to dominate the Commissioner's agenda on a daily basis.'*
- 'An in-depth discussion enabled him to increase his understanding of the Lawrence's relationship with the various campaign groups.....this, he said, would be of great value as he continued to prepare a draft submission to the Inquiry on behalf of the Commissioner'.*
- 'DI Walton explained the three main areas that his team is addressing;*
- 1. How to respond to the charge of institutionalised racism....*
 - 2. How to handle the second stage of the Public Enquiry....*
 - 3. How to regain the confidence of the black community..'*
24. The note bears the name of DI Lambert, and is dated 18.8.98, it is circulated to detective sergeants within the SDS, it is seen and minuted by Detective Chief Inspector N34:
- 'An excellent meeting and a good example of the strides N81 has made over the last 12 months'.*
- D157 25. The Ellison Review reports that this file note was found with other SDS Operational Strategy Reports from 1998/1999. The file note formed part of one report prepared in early September 1998 by DCI N34. The Strategy Report makes reference to the meeting between N81 and DI Walton:
- '...N81's unique insight into the behind the scenes machinations of the Lawrence campaign has also proved invaluable to A/DI Walton who is currently attached to the Stephen Lawrence review team. At a recent SDS meeting, N81 was able to give A/DI Walton a first-hand briefing on the case and offer some sound advice....'*
- '...regular reporting to C squad and additional discreet briefings to A/DI Walton when necessary.'*
26. This document was minuted by Detective Superintendent N35 and then passed to Special Branch Operations Commander Colin Black, who provided a minute dated 14 September 1998, as follows;
- 'Thank you. These papers confirm that SDS is, as usual, well positioned at the focal crisis points of policing in London. I am aware that (DI Walton) of CO24*

receives ad hoc off-the-record briefings from SDS. I reiterated to him that it is essential that knowledge of this operation goes no further. Would not wish him to receive anything on paper.....'

27. The Ellison Review explored how the meeting between N81 and A/DI Walton came about and who requested it. DI Lambert stated in his response to potential criticism in the draft Ellison Review report, that this meeting had been arranged at the request of his senior management within SDS, the request had come to Commander Special Branch and was delegated down to him. The purpose was for A/DI Walton to be in a position to brief the Commissioner. On that basis DI Lambert felt he could not be criticised.
- S2a 28. Operation Herne interviewed N81 in August 2013 in which N81 described the meeting taking place, but stated that N81 believed that A/DI Walton was an official from the Home Office. N81 describes the content of the meeting as follows:
- 'The official asked me generic questions about the campaign such as the mood on the streets and the impact of (N81's group) around the Stephen Lawrence inquiry, the black community and the churches.'*
29. When interviewed by the Ellison Review, N81 described the meeting as very unusual, and when read the contents of the file note created by DI Lambert, N81 described the note as being true, *'but N81 no longer had a clear recollection of all that was discussed'*.
- S2 30. An interview with N81 was sought during the course of this IPCC investigation. Eventually an agreement was reached that N81 would respond to a series of questions provided by the IPCC.
31. N81 stated that N81's memory of the meeting with Richard Walton was very poor. It was unusual in that N81 did not meet many people outside of the SDS in these circumstances. However, N81 also stated that N81 was not concerned about the meeting and considered it to be completely valid.
32. N81 could not recall how long before the meeting N81 had had the request to attend, but thought it was not more than a week. N81 believed that it was Robert Lambert who made the request to N81. N81 cannot now recall the purpose that was given for the meeting.
33. N81 recalled the meeting was at Robert Lambert's house and that there was no-one else at the meeting other than Richard Walton, Robert Lambert and N81. N81 stated that N81 told Operation Herne that N81 believed that Richard Walton was an official from the Home Office. This was N81's perception.
34. They talked about 'policy stuff' that had little to do with N81's day-to-day role as an undercover officer. N81 had a very faint memory that N81 was asked to give N81's view on what the police could do to improve its relationship with the black community. N81 recollected talking about the 'black churches' because N81's group was making efforts to infiltrate black church groups.
35. N81 could not recall if N81 was told that Richard Walton was preparing a submission to the Lawrence Inquiry. N81's perception of the meeting now was that they discussed the troubled police relationship with the black community. Any discussion about the Lawrence's would have been in terms of the effect of

the Inquiry on the police and community relationships.

36. N81 emphasised that N81 was not targeting the Lawrence family and N81 did not have any facts relating to the inner plans of the Lawrence campaign. N81's recollection of the meeting was about police relationships with the black community, it was not about N81's undercover role.
37. N81 could not recollect any information provided to N81 by Richard Walton. N81 said that the flow of information was from N81, giving N81's perspective, to Richard Walton, rather than an exchange of views. This was the only occasion N81 met Richard Walton.
38. [REDACTED], Head of Special Branch at the time of the Inquiry stated that he had no knowledge of the meeting having taken place – his permission was not sought and he would not have given it if asked. He would have taken this matter to his manager Assistant Commissioner Veness.
- D172 39. A/DI Walton is now Commander Richard Walton, still a serving officer within MPS as the Head of Counter Terrorism. He was interviewed by the Ellison Review in October 2013. Prior to this interview the file note prepared by Robert Lambert which detailed the meeting between Richard Walton and N81 was disclosed to Richard Walton. Richard Walton described a conversation that he had had with Colin Black, his recollection had been assisted by the documents disclosed to him. He described this conversation as taking place in 1998, either in person or on the phone and a discussion about ensuring intelligence from SDS was passed on, he describes Colin Black as saying:
- 'We need a conduit to ensure that anything we pick, particularly from SDS, can be fed in to support your reinvestigations of Lawrence, of [REDACTED] and [REDACTED]...We need to be absolutely certain that John Grieve got the whole story and the whole picture. And as you know Richard, we have got good coverage'.*
40. Richard Walton stated that he could not recall the meeting with N81 when first questioned about it by Operation Herne, but again the disclosure had reminded him of some of the detail. He goes on to say:
- '...I did attend, I don't think I knew it was Bob Lambert's personal address... but anyway, it was an address in [REDACTED]...I think it was a Sunday, and of course, I knew Bob Lambert because of my six years in Special Branch...so this would have been Colin Black, I am presuming would have talked to Bob Lambert...so Bob knew me, I knew him, so he called me up. I don't know how the meeting came about. I can't recall the detail. I remember seeing an individual that Bob Lambert introduced me to, but I can't visualise that person.'*
41. Richard Walton was questioned about the arrangements for the meeting and asked whose idea it was to go and see this undercover officer, he states:
- 'I can't remember who exactly...but I think it might have come from their end, I think it may have been that I bumped into Bob at some stage...Yes as I say it is a long time ago, but I think it might have been a chance meeting with Bob Lambert where he would have said something like, "Well if it helps, do you want to...would it help to meet the actual operative in the field?", I think it might be that. I think I said "yes Bob, that would help because it would allow me to contextualise what is actually going on out there because we are getting all sorts of feeds and to speak to a person actually in the field would probably be as good*

as it gets”.

42. Richard Walton goes on to describe how helpful the disclosed document had been in assisting his recollection. He states;

‘I don’t really dispute anything around that. In fact it prompts a lot about me meeting this individual. It is pretty much as I recall it, but only having been prompted by it...’

He is questioned about the value of the meeting and agrees as follows:

‘...the reporting here talks about great value and all the rest of it... I don’t really dispute that. I suppose it is a fraction strong from my recollection, but I remember the meeting being helpful, particularly around (N81’s group and another group) because there were genuine concerns around them...’

43. The questioning of Richard Walton continues to try to identify the reasons behind his attendance at the meeting. It is suggested to Richard Walton, that the remit of the SDS is around Public Order considerations, yet his remit is to do with the Stephen Lawrence Review Team, which did not have a public order remit. Richard Walton broadens this out to community tension concerns, but then points out that the timing of the meeting is important as he felt the meeting would have been of more benefit to him moving to a role in CO24, rather than any role he may have had within the Lawrence Review Team. There was extensive discussion about the role that Richard Walton was in at the time. Richard Walton suggests that it was at the end of his time on the Stephen Lawrence Review Team (SLRT) and that he was ‘transitioning’ into his CO24 role. CO24 was the newly formed Racial and Violent Crime Task Force. It was established during the summer months of 1998. Richard Walton did eventually transfer to CO24.
44. In terms of the reason for the meeting, Richard Walton states:
- “....I think it was legitimate to see that individual to give some context, and to actually, probably some reassurance that it wasn’t worse than we thought...”*
45. Questioned about the Lambert file note, Richard Walton agrees with the content, and in particular the points raised as 1,2,3 – How to respond to institutionalised racism, the second stage of the public inquiry and how to regain the confidence of the black community – “ *...that is all correct. That would have come from me, because, of course, as I said, the thrust of my Lawrence Review Team role was absolutely those things.*”
46. It was put to him that the note suggests he is still doing the submission and he replies:
- “Yes,. That is the submission that I’m referring to, yes. That is the only thing that I wrote. That is fine...in terms of the file note, I don’t dispute any of that....”*
47. The discussion then moved to some of the intelligence that had been gathered by undercover officers, including some personal information about Doreen (now Baroness) and Neville Lawrence. Whilst Richard Walton could not recall seeing this information, he described that it would now be considered to be collateral intrusion, “*...which is something that we are aware of now, perhaps more than we were then I guess...*”
48. Mr Ellison pointed out:

“..you had the ability to shape your own presentation with the benefit of that intelligence..”

Which meant that the MPS could present themselves in a particular way, without others, including the Inquiry, knowing about how they arrived at that position.

49. Richard Walton was then informed of the potential criticism to be made of him in the Ellison Review report and he provided a written response to that potential criticism. He made the following points:
- He had been a uniformed sergeant at the time of his work on the SLRT and was not promoted to DI until March 1999.
 - That he recalled speaking with DI Lambert in August 1998, he thought in the lift lobby at New Scotland Yard, and that DI Lambert having heard that he had been working in the SLRT suggested it would be helpful for him to meet an undercover officer who could shed light on the race issue emanating from the Lawrence investigation and Inquiry. Richard Walton had complied with this request, but had never seen the note of the meeting until his first interview.
 - Richard Walton now said that the note *“..was a mixture of truths and half-truths..... The word I would use about the record is perhaps embellished...”*
 - That he had done no further work on the MPS submission once he had moved to CO24. The submission was presented to the Inquiry on 18 September 1998, but had been finished some weeks prior to that.
 - Richard Walton had had only one oral briefing and saw no other written material from SDS officers.
 - He had never seen any intelligence regarding personal and tactical information about the Lawrence family and no information of this nature was provided to him during the meeting.
 - He recalled meeting with Commander Black during September 1998, when he had already started on CO24 (Racial and Violent Crime Task Force)
 - He has little awareness of the correspondence route set up by Commander Black.
 - He felt he had no responsibility to disclose the presence of the undercover officer in a group close to and interacting with the Lawrence family, as he had no role in SO12 or Special Operations at that time.
50. Richard Walton was provided with another opportunity to be interviewed by the Ellison Review, and this took place on 03 February 2014. The Ellison Review report describes the significant points from this re-interview as follows:
- Richard Walton stated that he had never been an A/DI on the SLRT so from this felt he must have part of CO24.
 - He now believed that he had started or was just about to start on CO24. He felt it was improbable that he was on the SLRT when he met the undercover officer.
 - The team that had drawn up the final submissions was separate to the presenting side and so was not involved in any of the tactical decisions made in relation to this. Richard Walton felt it was more legitimate to see the

undercover officer as part of the new team (CO24). *“There was a legitimacy to the meeting that there wouldn’t have been if he had been part of the Lawrence Review Team.”*

- He had gone to meet an undercover officer with ‘awareness’ of the race hate scene in London. He did not know that the officer had coverage of the Lawrence family. *‘He would not have gone to the meeting if he had thought that’.*
 - His meeting with the undercover officer was part of his CO24 role.
 - He did not know what documents would evidence his move to CO24 and the exact date.
 - Richard Walton said that the Ellison Review could not show that he was working on the MPS submissions at that time or that he had received any personal information about the Lawrence’s at the meeting.
 - He could not remember speaking with any senior officer prior to the meeting or after it.
 - There were inaccuracies in the file note, there was no mention of the Lawrence family at the meeting, he had not told anyone at the meeting what his role was.
51. Deputy Assistant Commissioner John Grieve was also interviewed by the Ellison Review with a view to establishing a timeline as to when Richard Walton made the transition from SRT to CO24. Mr Grieve was able to say that Richard Walton was not working for him at the time of the meeting in August 1998, but he may have been later. Mr Grieve provided no information on any knowledge of the meeting taking place, but since Richard Walton was not working to him at the time of the meeting, then no knowledge would be expected.
52. Mr Ellison interviewed Lord Condon, MPS Commissioner at the time of this meeting taking place, and there is no suggestion that Lord Condon had any knowledge of this meeting taking place or any information that came from that meeting. Lord Condon stated *‘There can be no justification for anything which is a sort of them and us tactical advantage over the Lawrence’s in any way’.*
53. Lord Stevens, who was Deputy Commissioner at the time of the meeting, was also interviewed by the Ellison Review. In response to the description of the meeting taking place, Lord Stevens replies *‘It is totally unacceptable...’*. Mr Ellison describes that some of the information passed back was of a personal nature about the Lawrence’s and tactics and Lord Stevens further stated *‘No, I would find that incredible and I would find that unacceptable in any circumstances, to be frank’.*

Relevant findings from the Ellison Review

54. The Ellison Review report made a number of findings which are relevant to this investigation:
- *“...for a meeting to then be arranged to enable an in-depth discussion to take place about the Lawrence’s’ relationship with groups, seeking to support their campaign, in order to help inform the MPS submission to the Public Inquiry, was, in our assessment, a completely improper use of the*

knowledge the MPS had gained by the deployment of this officer.”

- *“The meeting was apparently sanctioned at a high level of SDS management. Mr Lambert has claimed that he was asked to arrange it by senior management within the SDS. We also note that a file note he made was sent to the Detective Chief Inspector acting at the time. From a later file note that he made in September 1998, it would also appear that Special Branch Operations Commander was aware of the meeting.”*
- *“In so far as we can discern, it appears , therefore, that the SDS management thought that it was a good idea to have the meeting because it might be useful to the MPS in dealing with the Inquiry, and because it might fulfil part of the ‘wider remit’ that the SDS was seeking to serve at this time.”*
- *“Nobody seems to have considered how opening such a channel of communication would be viewed by the Inquiry or the public, if it became known, in the context, of the MPS’ opposition to the Lawrence family case at the Public Enquiry”*

55. The Ellison Review summarises Richard Walton’s position in respect of the meeting with N81 as ‘..less than straightforward to establish and somewhat troubling’. The Review then identified a number of areas where Richard Walton’s answers caused concern:

- In October 2013, Walton largely signed up to the accuracy of the SDS documents created close to the time of the meeting. Producing narrative answers to questions such as ‘How did the meeting come about?’ He provided detailed answers on how the meeting with N81 was relevant to his work on the SLRT and the justification on a public order basis.
- After notification of potential criticism, Walton was interviewed again in February 2014. He said that what he had said in October 2013 had been wrong, he had tried to be helpful and had accepted the accuracy of the notes that he had been presented with, but he had no recollection of events. Walton now firmly believed that he had been working within his CO24 role and was no longer on the SLRT. He challenged the accuracy of the SDS file note.
- The Ellison Review found the file note to be a more accurate version of the events at that meeting, having been written just days after the meeting.
- N81’s proximity to the Lawrence family campaign and N81’s intelligence was the background to any insight N81 could offer.
- In October 2013, Walton agreed with the file note. The Ellison Review found it difficult to understand how a senior officer would profess to have had his memory refreshed by the SDS file note and give detailed narrative answers about the arrangements and content of the meeting and the consistency with his SLRT role.
- As well as agreeing, he then challenged some of the detail, such as he had not raised the black community and the black churches with N81. This suggested he did have some recollection of the meeting. He stated he had no recall of the correspondence route set up with CO24.
- Walton attended a meeting of the Lawrence Inquiry Part 1 Submission Team on 13 August 1998, in which the submission that he had prepared had been discussed.
- Mr Grieve believed Walton was still working to Bob Quick (SLRT) at the time of the meeting.

- There was no clear indication of when Walton left the SLRT. Walton believed he was 'transitioning'.
 - The Ellison Review found Richard Walton's changed recollection to be unconvincing.
56. Further findings were made specifically about the actions of Richard Walton:
- "We find that on a balance or probabilities, on 14 August 1998, DI Walton was not so completely detached from the Lawrence Review Team, that his visit to see this undercover officer was concerned only with another function in CO24".
 - "...we accept that the meeting was not his (RW) idea, but a request from a more senior officer in the SDS. We also accept that he agreed to the meeting without any detailed knowledge of the actual role and intelligence gathered by the undercover officer".
 - "...Mr Walton may well have simply taken up the invitation without realising that he was going to meet an undercover officer who was positioned close to the Lawrence family campaign."
 - "...these events suggest a degree of naivety on his part, rather than a coherent plan to achieve some real advantage..."
 - "Mr Walton does not remember asking anyone about whether he ought to go to the meeting, or telling anyone that he had been..In so far as we have been able to enquire, no one has indicated that they knew about him going".
 - "We have found no evidence that what Mr Walton discovered from N81 at the meeting was actually incorporated into or used towards the final submission made on behalf of MPS"
 - "...on 14 August 1998 during a break between the end of the evidence received by the Public Inquiry and final submissions being presented, a meeting took place between an undercover officer deployed into an activist group engaged with the Lawrence family campaign and an MPS officer appointed to assist the MPS in formulating its submission to the Inquiry. In our view such a meeting was wholly inappropriate."
 - "Given the contested issues at the Public Inquiry as to the honesty, integrity and openness of the MPS, and the disputes as to the true causes of the seriously flawed investigation of Stephen Lawrence's murder..... It would have been seen as the MPS trying to achieve some secret advantage in the Inquiry from SDS undercover deployment".
 - "There was no conceivable 'public order' justification for this meeting. Nor was there any other discernible benefit, and certainly none that could possibly outweigh the justifiable public outrage that would follow, if the fact of the meeting had been made public when the Inquiry resumed in September 1998. In our opinion, serious public order of the very kind so feared by the MPS might well have followed."

Referral to the IPCC

57. As a result of the findings made in the Ellison Review, the Metropolitan Police Service (MPS) made a referral to the IPCC on 07 March 2014, which identified

the actions of Richard Walton in attending the meeting with the undercover officer as potentially 'Discreditable Conduct' (under the 1985 Regulations) in that it had the potential of '*...undermining the inquiry and public confidence.*'

- D201
58. The referral also included detail that Mr Walton potentially provided inconsistent accounts to the Ellison Review, which was considered to potentially be an 'Honesty and Integrity' issue, under the Police Reform Act 2002.
 59. A second referral was received from the MPS, 07 April 2014 highlighting the action of Robert Lambert and Colin Black, again, both subject of mention in the Ellison Review. This referral was in respect of the actions of the two officers in arranging the meeting between Mr Walton and the Undercover officer, which again had the potential of '*...undermining the inquiry and public confidence.*'
 60. The IPCC investigation into these matters was declared independent on 22 May 2014.
 61. As the investigation progressed, the IPCC identified two further officers within the management structure of the SDS at the time of the meeting, Detective Chief Inspector N34 and Detective Superintendent N35. Both featured in the file notes relating to the meeting with the undercover officer. The IPCC requested MPS to refer the conduct of the two officers to be included in this investigation. This referral was made by the MPS on 25 February 2015.

Other Investigations – Operation Herne

- D63
62. Operation Herne, led by Chief Constable Mick Creedon, examined the activities of the MPS Special Demonstration Squad. The report published in July 2014 focused on SDS reporting on a number of Justice Campaigns. Operation Herne had previously reported on the allegations made by N37. The report in March 2014, concluded that there was no witness or documentary evidence supporting the allegations of N37.
 63. With the Ellison Review, Operation Herne examined the role of N81 and the meeting that took place with A/DI Richard Walton. Operation Herne was critical that the meeting took place and expressed concern at the information provided during the meeting. They recommended further investigation.
 64. The Operation Herne report of July 2014 made clear the following:
 - N81 was engaged on a long term covert infiltration into the target organisation which they were tasked to do by MPS Special Branch. It was assessed that the group was involved in, or had the potential to be involved in serious public disorder.
 - It is clear in both the Trinity (Operation Herne) and Ellison reports that there was no evidence found that N81 was tasked to infiltrate the Stephen Lawrence family or any other family campaigning for justice. Their focus was on their target group.
 65. The Operation Herne report (July 2014) further stated that they confirmed that N81 was never directly or indirectly asked or tasked by anyone at any level in the MPS to do anything in relation to the Stephen Lawrence family or campaign. They were not tasked or directed at any stage into any Justice Campaign. N81 never met Neville or Doreen Lawrence, nor attended their home or even spoke

to them during this deployment.

66. The report also recognises that much of the intelligence collected was obtained by attending public meetings where the information was being discussed in a public forum. The information was, therefore, already in the public domain.

Specific areas of terms of reference

67. The report will now consider the evidence available in respect of each of the terms of reference, I will then analyse the evidence and arrive at recommendations for each area of the investigation.

Terms of reference 1: To investigate

a). The actions and intentions of Mr Lambert and Mr Black in arranging a meeting between acting Detective Inspector Richard Walton, from the MPS Lawrence Review Team, and an undercover officer deployed close to the Lawrence family in August 1998.

c). What other senior officers, if any, knew about or were involved in sanctioning the meeting and what were the reasons and circumstances for this.

68. These terms of reference must now include consideration of the roles of N35 and N34 in respect of their intentions in arranging the meeting between Richard Walton and the undercover officer.
69. Some documentary evidence existed of this meeting, which was referred in the Ellison Review report.

File note prepared by Robert Lambert (Doc 4012)

- D172 70. This note was provided to the investigation by Operation Herne, forming Doc 4012, which was disclosed to Mr Walton prior to his first interview with the Ellison Review.
71. This document contains the file note produced by Robert Lambert of the meeting with the undercover officer. The note is produced by Robert Lambert on 18 August 1998, the meeting having taken place on 14 August. It identifies the two individuals involved as N81 and Richard Walton. N81 was the undercover officer who was subsequently provided with the nominal identification of N81. The file note stated that Richard Walton was working on the SLRT He noted that the two individuals talked about the Lawrence Inquiry from their own perspectives. Robert Lambert described the exchange as ‘*..a fascinating and invaluable exchange of information...*’.
72. Robert Lambert described that the discussion allowed Richard Walton to increase his understanding of the Lawrence’s relationship with campaign groups ‘*..as he continued to prepare a draft submission to the enquiry on behalf of he commissioner*’.
73. Robert Lambert goes on to describe three areas that are being addressed by Richard Walton and his team:
1. How to respond to the charge of institutional racism – where Robert Lambert

details that the team is likely to admit the essence of this criticism, but is trying to change the terminology to include phrases such as 'unconscious racism' and 'a lack of understanding of black culture'. He also notes that this acceptance of the criticism will shock many serving officers.

2. How to handle the second stage of the Public Enquiry – Robert Lambert notes that Richard Walton talked about plans for the Commissioner to attend public forums, and N81 pointed out the vulnerability of particular venues. Robert Lambert notes discussion around what tactics would be best used as a response by MPS.
3. How to regain the confidence of the black community – Robert Lambert noted that Commander Grieve was now in charge of post-Lawrence black community relations and hoping to move on to a more positive relationship with the black community. N81 talked about the enormity of this task, particularly with some parts of the community.
74. The meeting ends with Richard Walton highlighting the concerns of the Home Office about the wider implications of the Lawrence case, and the potential for public disorder.
75. This note is dated 18 August 1998, and submitted by Robert Lambert to his then manager, N34.

Folio 3A – SDS strategy documents 1998/1999

- D157
76. This document begins by referencing a briefing note prepared by Robert Lambert which examines [REDACTED] involvement in the Stephen Lawrence campaign, and [REDACTED] groups in relation to racist incidents in London. This entry is made by DCI N34 on 03 September 1998, and is directed to Detective Superintendent Colin Black (OCU Commander – effectively Head of Special Branch). This is a [REDACTED] note.
 77. Robert Lambert includes the following passage in this briefing note:

'In addition to providing valuable public order intelligence for 'C' Squad, N81's unique insight into the behind-the-scenes machinations of the Lawrence campaign has also proved invaluable to A/DI Richard Walton, who is currently attached to the Stephen Lawrence review team. At a recent SDS meeting N81 was able to give A/DI Walton a first-hand briefing on the case and offer some sound advice (e.g. that the Commissioner would be ill-advised to attend a public forum at Lambeth Town Hall as previously planned). In terms of the Metropolitan Police's long term strategy of seeking to rebuild damaged relations with the black community, N81 was able to comment authoritatively on the enormity of the task generally, and in N81's own local area [REDACTED], specifically.'
 78. There is no specific date on this briefing note, other than September 1998. The N34 entry is dated 03 September, so the briefing note must predate this.
 79. The document passed from N34, via Detective Superintendent N35 (signed 10 September 1998) to Detective Superintendent Colin Black, who makes the following entry on 14 September 1998:

'Thank you. The papers confirm that SDS is, as usual, well-positioned at the focal crisis points of policing in London. I am aware that DI Richard Walton of

CO24 receives and had off-the-record briefings from SDS. I have reiterated to him that it is essential that knowledge of the operation goes no further. I would not wish him to receive anything on paper...

80. The document then passed back to Detective Superintendent N35 (14 September 1998), eventually returning to DCI N34, who made an entry, dated 21 September 1998:
'...We agreed that the papers of this file would be retained in SDS.'
81. The purpose of the document is identified in the initial entry by N34, *'to outline SDS performance and targeting strategy in two key areas'*. The briefing note prepared by Robert Lambert identifies the contribution of the SDS operatives in these areas and he, in particular, refers to the meeting with Richard Walton. The description of the meeting here is consistent with his file note prepared just after the meeting. Again there is mention that N81 can give insight into the Lawrence campaign and also that Richard Walton is currently attached to the Lawrence Review Team.
82. The document passed through layers of management to reach the Head of Special Branch, Colin Black. He picked up on the briefing to Richard Walton, but described him as being from CO24, rather than the SLRT. This entry also emphasised the secrecy of this contact by stating that he has emphasised that knowledge of the operation goes no further and he would not wish Richard Walton to receive anything on paper.
83. Colin Black is the highest ranking officer who can be shown to have had sight of this document. It is then passed back through N35 to N34, the final entry suggests the papers were filed in SDS.

Other evidence

84. The Ellison Review followed a 'Maxwellisation' process towards its conclusion, in that if any individual was to be subject of potential criticism, the Review would write to that individual, setting out the potential criticism, allowing the individual the opportunity to respond to the potential criticism.
85. This process was followed with Robert Lambert. In a letter, dated 23 January 2014, the Ellison Review informed Robert Lambert that he was to be subject of criticism in the review. That criticism (in terms of the remit of this IPCC investigation) was that Robert Lambert had arranged the meeting between Richard Walton and N81, *'an officer working within an activist group associated with Stephen Lawrence's family. Richard Walton was, at the time, working on the MPS team preparing a response on behalf of the MPS at the Inquiry'*.
86. The potential criticism also included that there was no justification for intelligence *'that included personal and tactical elements regarding the Lawrence family and their approach, being provided to an MPS officer working on the MPS case to be presented to the Inquiry'*.
87. Robert Lambert responded to this criticism, via his representative, as follows:
'Bob was told that the purpose of the meeting was so that Richard Walton could fully brief the Commissioner. The request came to Commander Special Branch

D192

- D193 *and was delegated down to Bob. Bob was not given any limitations as to what should be covered in the meeting – Richard Walton would ask questions and N81 would answer them. The note referred to is Bob’s brief summary of what took place for his/his boss’ records*
- Bob does not recall and therefore cannot agree that personal and tactical elements were discussed during that meeting – his note does not disclose that such material was provided in Bob’s presence.’*
38. A similar letter was written to Colin Black. The Ellison Review informed Colin Black of potential criticism within the review. This criticism focussed on the meeting between Richard Walton and N81 and suggested to Colin Black ‘Given your senior role in SDS management at the time, we believe you may merit some degree of personal criticism for allowing such a meeting to take place’.
- D196 39. Colin Black initially responded to this criticism on 03 February 2014, and pointed out ‘The idea, for example, that I could ‘allow’ a meeting to take place looks like it fails to grasp roles and responsibilities where the SDS was concerned. Similarly, it is simply wrong to refer to me as a ‘senior SDS officer’.
- D194 90. Colin Black wrote a second letter to the Ellison Review on 11 February 2014 and included in this ‘My dealings with SDS during my time in Special Branch could pretty much be written on the back of the proverbial postage stamp. As a unit it had a direct line to senior Met Police officers, of higher rank than anyone in SB..’ Mr Black did accept at times he was part of the ‘senior ‘line’ command’.
- D195

IPCC Subject interviews

Robert Lambert

91. Robert Lambert was a Detective Inspector in the MPS Special Branch (MPSSB) in 1998. He has now retired from the police service. He was served with a Regulation 16 Notice on 11 August 2014, which identified the allegations which had been assessed as potentially gross misconduct.
- D42 92. The Notice served on Mr Lambert set out that in 1998 Mr Lambert was a Detective Inspector (DI) in the MPSSB and responsible for the management of officers deployed in the Special Demonstration Squad (SDS), who would work undercover. Mr Lambert arranged the meeting between A/DI Walton and the undercover officer, who was deployed into one of the groups seeking to influence the Lawrence family campaign.
93. Mr Lambert was aware that A/DI Walton was seconded to the MPS Lawrence Review Team, which was preparing final submissions on behalf of the Commissioner of the MPS, to the Stephen Lawrence Inquiry. The meeting was arranged to allow information to be passed from the undercover officer to A/DI Walton, which could then be used by the MPS in preparing the final submission.
94. Arranging the meeting at this time had the potential to seriously undermine public confidence in the police service
95. Mr Lambert was interviewed on Tuesday 16 December 2014 and answered all questions put to him.
96. Robert Lambert stated in interview that he believed the request to arrange the

meeting had come from senior management. He was unable to recall who the request had come from. He believed, when he had been previously interviewed by Operation Herne, that Colin Black was part of the senior management, and from what he had also read, this seemed most likely, however, he was unable to recall any detail now.

Y2

Y2a

97. Robert Lambert stated that he felt that the request to arrange the meeting was lawful and legitimate. He had no thought that the request was in any way inappropriate. Robert Lambert described the context of the request as follows. N81 was reporting intelligence from N81's target group infiltrating the Stephen Lawrence campaign and this had been ongoing from before this request. If N81 was with N81's target group and they attended a meeting of the Stephen Lawrence campaign, then that would be reported through the normal channels. The reporting by N81 was known throughout the senior management.
98. Robert Lambert was unable to provide any detail on who requested the meeting but he stated that he could completely rule out the possibility that he organised the meeting of his own volition. This was not something that would happen.
99. He stated that he had been asked to arrange other meetings between undercover officers [REDACTED]. He also arranged meeting for C squad officers and undercover officers, but again he could not give any detail of who would have requested those meetings.
100. His role at the time was as an Operations manager, assisting the Detective Chief Inspector with managing operational deployments.
101. Robert Lambert was asked about the rationale for the meeting taking place, and he referred to the File Note. He felt that a significant part of the rationale was to allow the person making the request to gain an insight into what was happening in the area where the undercover officer is active, this was '*...offering Richard Walton the insight, enabling N81 to emphasise what N81's target group, what they were about... to give a little more understanding about their strategy for infiltrating the campaign*'. Robert Lambert stated this understanding was prompted by the file note and his knowledge of N81's role. It was not based on any recollection of any conversation that he had.
102. The request was for Richard Walton to meet N81. He had no knowledge of any other meetings being arranged and any recollection he had was based on the file note.
103. When questioned about Richard Walton's role at the time, Robert Lambert stated that it was clear to him that the meeting was to be arranged in the context of the Stephen Lawrence case. His recall of this was based on the file note. He could not recall the detail of how he arranged the meeting with Richard Walton.
104. Robert Lambert arranged the meeting to take place at his own flat, where he lived at the time. This was not an unusual practice and he had used his home address on previous occasions, for other, non-related meetings.
105. Robert Lambert stated that he was given the impression that Richard Walton had asked for this meeting. He did not recall any discussion with Richard Walton about what was to be discussed at the meeting.
106. He recalled the meeting lasted about two hours but without the file note he did not feel he would recall much of the detail. He considered that this was an

D172

'important' meeting but this rationale was about operational security rather than a Stephen Lawrence campaign link.

107. Robert Lambert was questioned about the role of N34 in these arrangements. He stated that he would not have been asked to arrange a meeting and exclude N34 from knowledge of it. He also accepted that N34 could have been involved in the management request.
108. Robert Lambert was unable to recall if he had made notes during the meeting. The file note did allow Robert Lambert to recollect that much of N81's reporting was on N81's interest group and their interest in the Stephen Lawrence campaign and *'my broad understanding was that that was the reason Richard Walton wanted this meeting'*.
109. Robert Lambert could not recall much further detail beyond that contained within the file note and stated that the issue around Lambeth Town Hall would have been reported through the normal intelligence channels. This meeting was not a substitute for that process. He felt that the information flow was generally from N81 to Richard Walton.
110. Robert Lambert could not recall briefing any of his management team on the meeting. He would have expected there to have been some verbal briefings on the day, but he could not recall any in detail. He described the purpose of the file note as putting the meeting on record and providing a brief summary for his management and colleagues. He would, unless N34 was not on duty, have briefed N34 on the meeting. He could not recall any discussion that this meeting was to be considered 'secret', but that would have been his understanding.
111. The accuracy of the file note was discussed and Robert Lambert described that as a summary, picking out the key points then he did feel it was accurate, but it was never meant to be a detailed record, and it was an internal SDS document.
112. Robert Lambert was questioned about Richard Walton's background as having previously been a Special Branch officer. Robert Lambert did have some knowledge of Richard Walton but had not worked directly with him. He could not recall any conversations about Richard Walton's background, but he did form the view that Walton's background in Special Branch, was a consideration in his involvement in this meeting.
113. Robert Lambert stated that he had no basis to think that this meeting was 'underhand'. He believed he would have sought clarity of the requirements for the meeting and the detail, but cannot now recall the detail of the discussion he had. He could not recall how Richard Walton's role in the Stephen Lawrence Inquiry fitted into the rationale for the meeting, but he was satisfied that it did.
114. He stated that much of N81's reporting was gathered from public meetings so he did not feel there was an issue with Richard Walton having this information. The 'tactical elements' criticism, would cover other intelligence being reported by N81, not just intelligence at this meeting. It would also include intelligence being provided through legitimate channels from other sources.
115. Robert Lambert was asked about the timing of the meeting and the potential risks that that caused. He stated that he did not have any considerations that this meeting added to any risk at the time. He had confidence in his senior management that the risks and disclosure would be dealt with appropriately.

D192

116. Robert Lambert was then asked about the flow of information in the meeting as the file note suggested it was from Richard Walton to N81, yet he had said it was the other way. He responded to this by saying that those who would have read the file note would have been aware of the issues that N81 was involved in, whereas the points raised by Richard Walton would not have been so well known.

Colin Black

D36

117. Colin Black was a Commander in the Metropolitan Police Service Special Branch in 1998. He has now retired from the police service. He was served with a Regulation 16 Notice on 12 August 2014 which identified the allegations that had been assessed as potentially gross misconduct.
118. The notice served on Colin Black set out that in 1998 he was a Commander within the Metropolitan Police Service Special Branch (MPSSB), and responsible for the management of all officers deployed within Special Branch, including officers deployed within the Special Demonstration Squad (SDS) who worked undercover.
119. In August 1998, he was involved in authorising and arranging a meeting between Acting Detective Inspector (A/DI) Richard Walton and an undercover officer who was deployed into one of the groups seeking to influence the Lawrence family campaign. He was aware that A/DI Richard Walton was seconded to the MPS Lawrence Review Team, which was, at that time, preparing a final submission on behalf of the Commissioner MPS, to the Stephen Lawrence Inquiry.
120. This meeting was arranged to allow information to be passed from the undercover officer to A/DI Walton, which could be used by the MPS for preparing the final submission to the Stephen Lawrence Inquiry. Authorising and arranging this meeting at that time had the potential to seriously undermine public confidence in the police service.
121. Colin Black was interviewed on Thursday 18 December 2014 and answered all questions put to him.
122. Colin Black was asked to identify his role within MPS Special Branch during 1998. He stated that he was the Head of Operations. Under his command were a number of squads covering areas such as Counter terrorism, Domestic extremism, International terrorism and others. One of these areas was S squad, which was run by a detective superintendent, believed to be N35. He was responsible for a number of departments, for example, Surveillance, Technical Support and one of these departments was the SDS. There was then either a detective chief inspector or detective inspector in operational charge.
123. He stated that he had little day-to-day contact with operational officers. His areas of responsibility were strategic areas around budgets, staffing and policy. He would only know what was happening within a unit, if it was brought to his attention by a superintendent, or if he had visited a unit to speak with staff.
124. He stated that he had no recall of the meeting between Richard Walton and N81. Due to the secrecy around SDS, he did not think meetings with undercover officers were taking place.

125. Colin Black stated that Richard Walton was working directly for the Commissioner, so he did not think he would be asked to authorise the meeting. He did not recall being asked to authorise this or being told, that it was happening.
126. He stated that he was aware of Richard Walton having worked in Special Branch, but he could not recall any conversation with him. He could not recall any conversation with Richard Walton about this meeting.
127. Colin Black stated he had no knowledge of the meeting between Richard Walton and N81 prior to it taking place. He only became aware afterwards. He had no recollection of having been told about the meeting, but accepted that he did know, because of the note that he had written. He cannot recall when he knew about the meeting.
128. He stated that he could not recall seeing any intelligence around the Stephen Lawrence Inquiry. He felt he may possibly have been aware of Richard Walton's role in relation to Stephen Lawrence, but he confirmed that he had no memory of any conversations with Richard Walton about the meeting with the undercover officer and no memory of a conversation with Richard Walton about the Stephen Lawrence Inquiry. He could not recall any direction that Special Branch were given in relation to intelligence relating to the Stephen Lawrence Inquiry. He stated that he had little operational input and that tasking of sources did not come to him for approval.
129. Colin Black was questioned on the circumstances of the meeting between Richard Walton and the undercover officer, the timing of the meeting, the role that Richard Walton was fulfilling and the role of the undercover officer. Colin Black did not believe there was anything inappropriate in the meeting taking place. He strongly disputed that N81 was tasked 'into' or 'close' to the Lawrence family. He strongly disputed that the meeting was inappropriate.
130. Colin Black was questioned in relation to the Robert Lambert file note. He stated that he did not recall anything from his entry on the file note. He could not recall why he talked about 'ad hoc briefings' and he presumed he had been told about this. He confirmed that he must have thought Richard Walton was in CO24. He interpreted his minute as a post event wrap up, highlighting some work that had been completed. He interpreted some of the document (*'...essential knowledge of the operation goes no further, don't receive anything on paper...'*) as him putting conditions on the meeting, but this could not be the case as it was after the meeting has taken place. He emphasised that there was nothing in his note that suggested he had knowledge of the meeting before it took place.

D172

N35

131. N35 was a Detective Superintendent in the MPSSB in 1998. He has now retired from the Police Service. He was served with a Regulation 16 notice on 12 May 2015, which identified that the allegations had been assessed as potentially gross misconduct.
132. The notice served on N35 set out that in 1998 he was a Detective Superintendent in the MPSSB, and responsible for the management of officers deployed within Special Branch, including officers deployed within the Special

Demonstration Squad (SDS) who worked undercover.

- D199
133. In August 1998, he was involved in authorising and had knowledge of a meeting between Acting Detective Inspector (A/DI) Richard Walton and an undercover officer who was deployed into one of the groups seeking to influence the Lawrence family campaign. He was aware that A/DI Richard Walton was seconded to the MPS Lawrence Review Team, which was, at that time, preparing a final submission on behalf of the Commissioner MPS, to the Stephen Lawrence Inquiry.
134. This meeting was arranged to allow information to be passed from the undercover officer to A/DI Walton, which could be used by the MPS in preparing the final submission to the Stephen Lawrence inquiry. Authorising and arranging this meeting at that time had the potential to seriously undermine public confidence in the police service.
135. N35 provided a response to his Regulation notice on 12 May 2015 in which he stated:
- 'I did not authorise the August 1998 meeting arranged by Detective Inspector Robert Lambert. Furthermore, I had no knowledge of it at the time and to the best of my recollection, I was not aware of it subsequently'.*
- D155
136. He goes on in the response to describe that he recalled a meeting with Colin Black (then Detective Chief Superintendent), in which Colin Black told him about a liaison he had established between Special Branch and CO24. He stated he had no recollection of the 'ad hoc' briefings to Richard Walton and he saw nothing untoward in Special Branch providing assistance to CO24.
137. N35 was interviewed on Thursday 04 June 2015 and answered all questions put to him.
138. N35 initially gave an overview of his career. He stated that he had been in Special Branch Ports Unit in 1995, and in September 1997, transferred to S Squad. The SDS was a small part of his responsibility and he considered it to be a self-contained unit. N35 never served on the SDS, he retired in 2003, still on S Squad.
- Y4
139. N35 stated that he would have had little operational involvement with undercover officers, he believed that a lot of SDS issues were taken straight to Colin Black. He very rarely met with undercover officers, this was the remit of the Detective Inspector and Detective Chief Inspector.
140. He would not have seen all tasking, but he could not recall any conflict over any tasking. The DCI and DI from SDS would periodically come to New Scotland Yard for meetings and they would update either Colin Black or himself. There were no regular meetings with SDS staff.
141. N35 stated that he never knew Richard Walton. He could not recall ever having a conversation about him or with him. He did not recall ever meeting Richard Walton or speaking to him.
142. N35 was questioned about his recollection of the Stephen Lawrence Inquiry and he stated that his only knowledge was what he saw in the media, and it was considered to be more of a CID issue and not a Special Branch issue. These were quite separate departments. He stated that at general superintendent level,

there was little interest in the MacPherson Inquiry.

143. N35 stated that he had dealings with N37, and he felt that the views being expressed by N37 now, were N37's alone. He felt that N37 had had ample opportunity to raise the issues about the Lawrence's and undercover officers at the time, that N37 did subsequently, but N37 never did.
144. N35 stated that he had no knowledge of the arrangements for the meeting with Richard Walton and the undercover officer. He accepted from the minute sheet that he later had knowledge of it. He recalled a conversation with Colin Black about a correspondence route to CO24, but did not recall the Colin Black minute at all. He did not think undercover officers met anyone outside of Special Branch.
145. N35 did not recall the Robert Lambert file note. Having read it now, the note did not concern him as the Lawrences were not being targeted. He stated the meeting with Richard Walton took place without his knowledge. He could not recall any conversations about the meeting.
146. He was unable to say if this Intelligence Summary was a one off document or not. He stated that if he had been concerned when he learned of the meeting he would have raised it with Colin Black. He had no recall of raising this. He did not agree with the Ellison Review 'spy in the Lawrence family' conclusions. The intelligence gathering was around the groups not the Lawrence family.

N34

147. N34 was a Detective Chief Inspector in the MPSSB in 1998. He has now retired from the police service. He was served with a Regulation 16 notice on 14 May 2015 (via his representative), which identified that the allegations had been assessed as potentially gross misconduct.
148. The notice served on N34 set out that in 1998 he was a Detective Chief Inspector in the MPSSB, and responsible for the management of officers deployed within Special Branch, including officers deployed within the Special Demonstration Squad (SDS) who worked undercover.
149. In August 1998, he was involved in authorising and had knowledge of a meeting between Acting Detective Inspector (A/DI) Richard Walton and an undercover officer who was deployed into one of the groups seeking to influence the Lawrence family campaign. He was aware that A/DI Richard Walton was seconded to the MPS Lawrence Review Team, which was, at that time, preparing a final submission on behalf of the Commissioner MPS, to the Stephen Lawrence Inquiry.
150. This meeting was arranged to allow information to be passed from the undercover officer to A/DI Walton, which could be used by the MPS in preparing the final submission to the Stephen Lawrence inquiry. Authorising and arranging this meeting at that time had the potential to seriously undermine public confidence in the police service.
151. N34 was interviewed on 24 September 2015 in the presence of his legal representative. He declined to answer any questions put to him during the interview. N34 subsequently provided a statement, under the misconduct caution

D200

(for retired officers), which was received by the IPCC on 14 October 2015.

- Y5 152. In his statement, N34 set out some of his past career, in that he joined Special Branch in [REDACTED] and worked as an [REDACTED] from [REDACTED] to [REDACTED]. He was promoted to detective chief inspector in 1997 and transferred to the SDS in mid- 1998. Robert Lambert was working to him as a detective inspector. N34 retired in 2001.
- S1 153. N34 stated that the first time that he was asked to recall the meeting between Richard Walton and the undercover officer was in May 2015, by the IPCC. He did not have a clear recollection of the circumstances surrounding the meeting, but what he would say in his statement was a reconstruction based on the documents disclosed to him.
154. He had no recollection of how this meeting came to be arranged or who initiated it. He had no recollection of being involved in making a request to Robert Lambert to arrange this meeting.
155. He was shown the Robert Lambert file note and the SDS Intelligence Update September 1998. He had no recollection of these documents, but accepted that he must have read the documents, as he had initialled the file note. He accepted that he must have read the Robert Lambert file note on 18/8/98, but he had no recollection of signing it.
- D172 156. He referred to the SDS Intelligence Update September 1998 (Colin Black file note). He accepted that he must have read this file note, but he had no recollection. He did not consider this to be suggestive of anything inappropriate taking place.
157. N34 stated, having read the disclosed statement of the undercover officer that he agreed with the comments of the officer in that the officer was not tasked into the Stephen Lawrence Campaign or the family. He states that there was no operation to undermine the Stephen Lawrence campaign, and he believed that allegations suggesting this were misconceived.
- S2a 158. He further stated that while he was in SDS, no-one considered whether it was appropriate or proportionate to continue undercover deployment in a group that got close to the Lawrence family, or disclosure to a Public Inquiry. It did not occur to N34 that the meeting between Richard Walton and the undercover officer could have been seen as inappropriate while the Public Inquiry was in progress. He stated that disclosure of the role of an undercover officer would only have been considered in extreme circumstances. He finished by stating that there was not an attempt to spy on the Lawrences.

Richard Walton

159. Commander Richard Walton is still a serving officer in MPS. He was served with a Regulation 16 Notice on 30 July 2014, detailing allegations which had been assessed as potentially gross misconduct.
- D38 160. This notice set out that Commander Walton was an Acting Detective Inspector (A/DI) in 1998 and seconded to the MPS Lawrence Review Team, which was responsible for drawing up the final submissions on behalf of the MPS Commissioner, for the Stephen Lawrence Inquiry.
161. In August 1998, A/DI Walton attended a meeting with an undercover officer, who

had been deployed into one of the groups seeking to influence the Lawrence family campaign. The undercover officer could have been in possession of information which had the potential to influence the MPS submission to the Stephen Lawrence Inquiry. Attending this meeting had the potential to seriously undermine public confidence in the police service.

162. Commander Walton was then interviewed by the Ellison Review in October 2013 and February 2014 about his recollection of the meeting. In the second interview, in February 2014, Commander Walton changed his recollection of the meeting. Providing different accounts had the potential to mislead the Ellison Review and potentially undermine public confidence in the police service.
163. Commander Walton was interviewed on Friday 19 December 2014, when he answered all questions put to him.
164. Richard Walton began the interview with the IPCC by stating that to date he had been interviewed twice by the Ellison Review, he had now read the Operation Herne and Ellison reports. He wanted to co-operate fully with the IPCC Independent investigation.
165. In terms of this section of the report, the only aspect of the Richard Walton interviews that is relevant is that Richard Walton was asked if he briefed anyone on the content of the meeting, and he stated that he could not recall if he did or if he did not.
166. This interview will be discussed in more detail later in this report.

Y1
Y1a
Y1b
Y1c

Analysis of the evidence

167. In order to reach conclusions it was necessary for me to analyse and evaluate the evidence. Where I have needed to make factual findings I have applied the “balance of probabilities” standard of proof. In deciding whether something is more likely than not to have occurred, I have had regard to all of the available evidence and the weight to be attached to it.
168. Since this case was one subject to special requirements I am required only to form an opinion about whether there is a case to answer for misconduct or gross misconduct for each subject. In doing so I will not reach findings of fact that would be conclusive of misconduct or gross misconduct which may take place – these findings should be left for any subsequent misconduct hearing or meeting. For retired officers there can be no misconduct hearing or meeting.
169. The key independent evidence about the meeting is the file note produced by

Robert Lambert on 18 August 1998 and the September Intelligence Summary which bears comments from N34, N35 and Colin Black.

The Robert Lambert File Note

- D172
170. This note contains a large amount of detail of an area that it would perhaps be expected that Robert Lambert would not have detailed knowledge about. In his role at the time, he would, undoubtedly, have been aware of the ongoing work by the SLRT, and that there was a further submission to be made to the Inquiry. But he would not be expected to have knowledge of a large amount of detail.
 171. It is my assessment that the note highlighted the significant impact he believed SDS had made on an ongoing, current issue for MPS at that time. It demonstrated that the undercover officer had been tasked to the heart of a current issue, and that tasking could potentially have had enormous benefit for MPS in their interaction with the MacPherson Inquiry.
 172. The note described an exchange of information, and that there was a significant flow of information from Richard Walton to the undercover officer. If the briefing was to be for Richard Walton, it would potentially be expected that more detailed information would have been provided to him. Significantly, Richard Walton, described the three key areas that were causing most concern for the SLRT.
 173. The file note is put together by Robert Lambert, most likely for internal use only within SDS, to inform SDS senior management of the success of this interaction with Richard Walton. To inform them [REDACTED] that the SDS had achieved something significant. The evidence suggested that briefings with external stakeholders were rare events.
 174. The fact that it was apparently not commonplace for these briefings to take place would add to the significance of this exchange of information.
 175. The openness of the report by Robert Lambert suggested that he saw nothing sinister or underhand in this meeting taking place and the file note did not suggest at all that the meeting was inappropriate. There was no consideration in the note as to whether there was to be any disclosure that this meeting had taken place. Lambert reported the facts to his management, aware that he was working in an environment of extreme secrecy.

D157

The Colin Black file note (DOC 1784)

176. The message about what took place at the meeting was consistent, in that there was an exchange between an undercover officer and a representative from the SLRT. There was consistent detail, in relation to the advice about the vulnerability of the Commissioner attending Lambeth Town Hall. The detail entered here tends to support the accuracy of the initial briefing note, albeit, they are prepared by the same individual. The detail of this meeting appeared not to be the main thrust of this document. The detail was included to add weight to the importance of the work and contribution made by SDS operatives.
177. The note passed through a number of individuals in the management chain and there was no questioning of the legitimacy of the meeting, how it came about, who asked for it to take place, whether it was part of an ongoing tasking. It suggested only positive outcomes from the linking of the undercover 'behind-the-

scenes' knowledge and Richard Walton, who was engaged in the work of the SLRT.

178. Within the SDS Management environment there appeared no suggestion that this meeting may be inappropriate in any way, nor badly timed in view of the ongoing MacPherson Inquiry. At Colin Black's position within MPS, it would be expected that he would have knowledge of the ongoing position with the MacPherson Inquiry. A meeting had taken place with an individual who was not a stakeholder, nor involved in the tasking of the undercover officer. The meeting would have been out of the ordinary, which would have been evident to all those who were receiving this briefing note, yet there is no questioning of the legitimacy of it. There is no suggestion that the fact the meeting had taken place would be disclosed at any stage. All of those in this management chain are working under the expected secrecy of the SDS environment, with these documents being filed within that same environment.
179. This evidence demonstrates in unequivocal terms that:
 - The meeting with N81 took place on 14 August 1998
 - Those involved in the meeting were N81 and Richard Walton.
 - Robert Lambert put the arrangements in place for this meeting.
180. Robert Lambert in interview under caution said that he had been asked to arrange this meeting by 'senior management'. He was unable to say who, exactly, had asked him to do this. He thought it was unlikely that he would have been asked to arrange this meeting and exclude N34, who was his first line supervisor. The meeting took place in Robert Lambert's home (at that time), which was not an unusual practice. The practice of 'tasking' officers, meeting directly with undercover officers was not unheard of, but was not common practice.
181. Robert Lambert believed the request to hold this meeting had come from the SLRT end, he believed he would have sought some clarification on the detail of the meeting, but he was unable to recall now what this detail was, or how Richard Walton's role in the SLRT figured in the rationale for the meeting.
182. Robert Lambert did not consider whether the meeting may or may not have been inappropriate. He understood that much of N81's intelligence was gathered from attending public meetings, so Robert Lambert did not see that there could be any issue with Richard Walton having access to this intelligence.
183. He stated he was tasked by his own 'senior management' to arrange the meeting, he made notes of the content of the meeting and reported upon it within the SDS environment. His file note was subsequently circulated among other SDS officers, commented upon by supervising officers, and ultimately subject of favourable comment by Head of Operations within Special Branch, Colin Black.
184. Robert Lambert could not provide any detail on how the arrangements for the meeting were put in place.
185. Colin Black was the Head of Operations within Special Branch at the time the meeting between the undercover officer and Richard Walton took place. The September Intelligence Summary (first entry dated 03 September 1998) demonstrated that he had seen the file note produced by Robert Lambert. Colin Black stated that he had no knowledge of the meeting taking place at the time,

- but accepted from his comments that he must have known afterwards.
186. As Head of Operations within Special Branch he was in a strategic role and he would not have expected, nor did he have, day-to-day contact with operational officers. If this meeting was being arranged, he would not have expected to have been consulted on it.
 187. The file note which he created demonstrated knowledge of the meeting after it had taken place. He denied that he was involved in authorising or allowing this meeting to take place. Robert Lambert stated in interview that the request to arrange this meeting had come from 'senior management'. Robert Lambert was unable to say who made this request. He knew and had regular contact with those in the management chain above him, N34, N35 and Colin Black.
 188. There is no evidence that Colin Black had knowledge of the meeting or its arrangement prior to it taking place.
 189. Colin Black had no recollection of any conversations with Richard Walton about this meeting or the Stephen Lawrence Campaign. Colin Black did not accept that the meeting between the undercover officer and Richard Walton was inappropriate.
 190. N35 was the Head of S Squad, which included the SDS. He stated that he had little day-to-day contact with operational undercover officers, this contact was managed by Robert Lambert and N34. He could not recall any conversations with or about Richard Walton. He had no memory of the meeting with Richard Walton taking place and he could not recall any conversations in respect of this meeting.
 191. N35 did not recall the Lambert file note and he was unable to say if the Intelligence Summary was a one-off document or not. He accepted that he had later knowledge of the file note as he had initialled it.
 192. The file note did not cause N35 any concerns as he did not consider that SDS were targeting the Lawrence family, they were targeting interest groups, as such, he did not consider that the meeting between the undercover officer and Richard Walton was inappropriate.
 193. The Colin Black file note demonstrated that N35 had knowledge of the meeting after it had taken place. There is no documentary evidence that suggests that N35 could have prevented this meeting taking place, or had knowledge of it prior to it occurring. Robert Lambert did not suggest that N35 directed him to arrange the meeting, albeit, N35 formed part of the 'senior management' of the SDS. The file note entry by Colin Black referred to the file note being sent back to N35, and the suggestion is that the file note was filed within the SDS.
 194. N34, at the time of this meeting, was a detective chief inspector within the SDS environment, he was a direct supervisor of Robert Lambert. He stated that he had no recollection of making a request to Robert Lambert to arrange this meeting. Lambert stated that he would not have been asked to arrange a meeting and to exclude N34 from knowledge of it. Robert Lambert did not specifically name N34 as the source of the request, but stated that he could have been involved in the chain of command.
 195. N34 chose to answer 'No Comment' to all questions put to him and he subsequently provided a statement under the misconduct caution (for retired

officers), covering the areas of the interview questions. This effectively meant that N34's answers to questions and his recollection of events about this meeting could not be properly challenged in an interview.

196. N34 accepted that he saw the Lambert file note on 18 August 1998 that he initialled the document, but he had no recollection of it. N34 stated that the undercover officer was not tasked into the Stephen Lawrence Campaign or Lawrence family and that at no stage did he consider the meeting between the undercover officer and Richard Walton to be inappropriate.
197. The documentary evidence confirmed N34's knowledge of the meeting just four days after it had taken place. Yet there is no evidence that he was involved in authorising or making arrangements for the meeting to take place. Significantly, he is not named by Robert Lambert, even though he must have had a very close working relationship with him.

Conclusions

198. Below, I have set out my conclusions for the appropriate authority and Commission to consider.
199. These conclusions are based on the evidence obtained during the investigation and summarised above.
200. If there are to be court or disciplinary proceedings it will be for the relevant tribunal in those proceedings to make final determinations. For example, where I conclude that person subject to the investigation has a case to answer for gross misconduct, this does not amount to a legal determination that there has been gross misconduct. If a charge is then brought by the appropriate authority a misconduct hearing will hear the evidence, and make its own findings about whether the charge is proved or not. For retired officers there can be no misconduct proceedings.
201. I have made factual findings, where appropriate, by applying the balance of probabilities test to the evidence. In other words, I have decided whether it is more likely than not that the fact alleged occurred.
202. After reviewing my report and considering my recommendations, the Commission will decide whether any organisational learning has been identified that should be shared with the organisation in question. They may also recommend or direct, unsatisfactory performance procedures.

Robert Lambert

203. Robert Lambert provided no evidence on who asked him to arrange this meeting. His evidence that the request came from the SLRT end is at odds with the evidence provided by Richard Walton. Lambert provided no detail on how the arrangements for the meeting were put in place. Whilst Lambert had arranged meetings for tasking officers and security service officers previously, the request for a meeting with an officer from the SLRT should have caused him to question the validity of the request.

204. He was aware in vague terms of Richard Walton's role on the SLRT. Robert Lambert should have been aware that there was a danger that had knowledge of the meeting entered the public domain, there could have been serious consequences for the public perception of the force. Robert Lambert's actions had the potential to bring discredit on the reputation of the force.
205. There is no suggestion from those interviewed that Robert Lambert would have acted of his own volition in bringing this meeting about. Robert Lambert, himself, dismisses this as a suggestion. There is, however, no evidence to link other members of the SDS to any of the arrangements for this meeting.
206. The original MPS justification for the deployment of SDS officers was to prevent public disorder although there is evidence that this remit had been widened in 1997¹ both Lord John Stevens and Lord Condon, in their evidence to the Ellison Review, accepted, as Ellison concluded, that using SDS officers to achieve some (secret) advantage when making submissions to the MacPherson Inquiry from SDS undercover employment which had access to the Lawrence family's circles, would cause justifiable public outrage. In the investigator's opinion, if the fact of the meeting had been made public when the Inquiry resumed in September 1998, serious public order of the very kind so feared by the MPS might well have followed.
207. At the time of the meeting in August 1998 police disciplinary offences were set out in the Discipline Code contained in Schedule 1 to the Police (Conduct) Regulations 1985. Paragraph 1 set out a disciplinary offence where an officer behaved in a manner reasonably likely to bring discredit on the reputation of the force or the police service.
208. **It is the investigator's opinion that had Robert Lambert still been a serving officer, a reasonable misconduct panel or meeting properly directed could find that on the balance of probabilities that he had behaved in a manner likely to bring discredit on the reputation of the police service. It is therefore my opinion that there is a case to answer for Robert Lambert in respect of misconduct. Robert Lambert was a mid ranking officer within the SDS at the relevant time, his own evidence is that he was asked to arrange the meeting by a senior officer. It is clear that he reported on the meeting to his senior officers in an open and transparent manner and his superiors were pleased that it had taken place. That there was no recognition of the impropriety of holding the meeting may reflect poorly on the culture of the SDS, which is a matter for the Herne Investigation and the Public Inquiry to be led by Lord Justice Pitchford. However it is accepted that Robert Lambert was acting with the knowledge and (on the balance of probabilities) at the request of his superiors, albeit that it has not been possible (see below) to identify who in his chain of command asked him to arrange the meeting. For this reason it is the Investigator's opinion that this potential failing would not have been so serious as to justify dismissal and the recommendation is, therefore, one of misconduct only.**

¹ Operation Herne Report 2 paragraph 15.1

Colin Black

209. Colin Black was in a strategic role within Special Branch. The evidence available shows he had knowledge of the meeting after it occurred and he could not, therefore, have prevented it taking place. There is no positive evidence that he knew of it beforehand although Richard Walton's evidence in his first interview with the Ellison Review was that he had had a conversation with Colin Black in which he was asked if he was comfortable receiving intelligence relating to SDS, This may suggest that the meeting was instigated by him. However Richard Walton's own evidence is that he cannot be sure that this was before the meeting.
210. Therefore there is insufficient evidence available to find that Colin Black was involved in authorising or arranging the meeting between Richard Walton and the undercover officer. Although he was undoubtedly aware of it after it had taken place, the Discipline Code did not require that officers reported improper conduct, as they are required to do so now.
211. **It is the investigator's opinion on the basis of the evidence available, that a reasonable misconduct panel or meeting properly directed could not find on the balance of probabilities that there had been a Breach of the Discipline Code and so there is no case to answer in respect of Gross Misconduct.**

N35

212. N35 was in a strategic role, with little day-to-day contact with undercover officers. The evidence available in terms of the file note and the Intelligence Summary, only suggest that he had knowledge of the meeting after it had taken place. He was, however, part of the senior management within the SDS management structure. As set out above the Discipline Code at that time did not require that he reported improper conduct.
213. There is insufficient evidence that he was involved in authorising or making the arrangements to put this meeting in place.
214. **It is the investigator's opinion on the basis of the evidence available, that a reasonable misconduct panel or meeting properly directed could not find on the balance of probabilities that there had been a Breach of the Discipline Code and so there is no case to answer in respect of Gross Misconduct.**

N34

215. With such a close working relationship between Robert Lambert and N34, it is inconceivable that Robert Lambert would have been able to make the arrangements for this meeting to take place without some knowledge on the part of N34.
216. However, to make a positive recommendation in respect of N34, there must be evidence that demonstrated that he had knowledge of the meeting prior to it taking place. The evidence available is that he knew about the meeting from Robert Lambert's file note, four days after the meeting had take place.
217. However the documentary and witness evidence available is insufficient for a

tribunal to be able to infer, that he incited, encouraged or was knowingly an accessory to the meeting being arranged

218. **It is therefore the investigator's opinion on the basis of the evidence available, that a reasonable misconduct panel or meeting properly directed could not find on the balance of probabilities that there had been a Breach of the Discipline Code and so there is no case to answer in respect of Gross Misconduct.**
219. I am satisfied, on the balance of probability, that the meeting between N81 and Richard Walton was initiated within the SDS. The evidence available from Robert Lambert suggested that he was instructed to put the meeting in place by 'senior management'. He was unable to identify or recall who instructed him. Robert Lambert stated that he would not have been asked to arrange the meeting and exclude N34 from any knowledge of it and N34 could have been involved in the chain of command.
220. In terms of positive evidence, the only officers who can be shown to have been involved in making the arrangements for this meeting are Robert Lambert and Richard Walton. No other officers can be linked to knowledge of the meeting until after it had taken place, so no officer 'senior' to Robert Lambert, could be proved to the required standard to have had any influence on the situation. The documentary evidence available demonstrated that N34, N35 and Black all became aware that the meeting had taken place. All said they were unable to provide any recollection of having seen the documentation discussed, but all accepted that they were aware as they have put comment or initials on the documents. Neither N34, N35 nor Black considered the meeting to be inappropriate.
221. Richard Walton cannot recall seeking any advice or guidance on attending the meeting and cannot recall briefing anyone after the meeting.
222. The file note entry made by Colin Black, he felt suggested a 'pat on the back' for those involved. The correspondence route he then set up, was a route for intelligence to flow into CO24, and this again would be after the meeting had taken place. The documents demonstrated that they remained within SDS.
223. Unfortunately, as set out above, although the investigator accepts, on the balance of probabilities that Robert Lambert was asked by someone in senior management to arrange the meeting, it is not possible to establish, to the required standard of proof which individual(s) that was.
224. It is the investigator's opinion based on the balance of probabilities, that there is no evidence available that any senior officer outside of the SDS knew about this meeting before or after the meeting.

Terms Of Reference:

To investigate 1;

b). The actions and intention of Mr Walton in attending a meeting with an undercover officer deployed close to the Lawrence family in August 1998.

d). What information was obtained by Mr Walton and how this was used to

influence the MPS final submission to the Stephen Lawrence Inquiry.

225. Documentary evidence that is relevant to this aspect of the investigation includes:

D89

Department of Legal Services, minutes of meeting held 08.00am, 13 August 1998

226. These are the minutes of a meeting of The Lawrence Inquiry Part 1 Submission, 08.00hrs, 13 August 1998. This is a meeting of a strategic group, chaired by Assistant Commissioner Johnston, with other senior officers present and representatives from the MPS Solicitors Department and Counsel. The minutes suggest this meeting was to discuss the preparation of the written submissions to the Inquiry.
227. The minutes suggest the discussion focussed on themes for the oral submissions of:
- Race/Corruption/Re-iteration of an apology
228. A suggestion from Lead Counsel is that the oral submissions should focus on the following areas:
- Race/Corruption/The Way Forward.
229. Lead Counsel is also recorded as commenting;
- 'Race – NSY submission is excellent.'*
230. Richard Walton is not recorded as being at this meeting.

D92

Department of Legal Services, minutes of a meeting held at 09.30am, 13 August 1998

231. This appears to be a follow-on meeting from the above, in the same room. Counsel are present, Superintendent Quick and DS Sutherland, who had all been at the previous meeting, but significantly, A/DI Richard Walton was also now present.
232. The minutes suggest this meeting focussed on agreeing a structure for the submissions and records that Superintendent Quick talked about the three areas of: Race/Corruption/Competence.
233. A/DI Richard Walton was not noted as speaking at any stage in the meeting but was recorded as being present. There is nothing in the minute to suggest that A/DI Walton was not performing a role on the Stephen Lawrence Review Team.

D188

Department of Legal Services, minutes of a meeting held at 4pm, 07 August 1998 (from Ellison Team)

234. These are minutes of an earlier meeting, of the group present at the meeting described at paragraph 215. Richard Walton was present at this meeting.
235. The minutes again reflect a debate at a strategic level as to the approach with the oral and written submissions still to be made to the Inquiry.

Metropolitan Police Service Submission to Part 1 of the Inquiry into the Matters Arising from the Death of Stephen Lawrence (September 1998) Chapters 15 and 19 – Race and Issues of Race.

236. This document contained the two chapters that Richard Walton drafted for the SLRT. Chapter 15 was entitled Race and Chapter 19 was entitled Issues of Race. The content of the two chapters are discussed in the Analysis section of this part of this report.

IPCC Subject Interview

Richard Walton

237. Commander Walton was interviewed on Friday 19 December 2014, when he answered all questions put to him.
238. Richard Walton began the interview with the IPCC by stating that to date he had been interviewed twice by the Ellison Review, he had now read the Operation Herne and Ellison reports. He wanted to co-operate fully with the IPCC Independent investigation.
239. He stated that he was trying to put forward an accurate account, but he could not now be sure of what he could properly recall or what he was now re-constructing in his mind having other information available to him. He was asked to comment by the Ellison Review on documents that he had not previously seen. He believed that he had acted with integrity throughout.
240. Richard Walton recalled conversations with Robert Lambert and Colin Black but could not recall when they occurred. He believed that he may have got these the wrong way around in his initial interview with the Ellison Review.
241. Richard Walton described himself as being the 'expert on Race issues' within SLRT. There had been some public order issues at times during the public parts of the Inquiry. Richard Walton stated that that was the context of the time when he had the meeting with Robert Lambert. He believed that there was a public order, public disorder remit and they were the grounds for the meeting.
242. Richard Walton stated '*The precise reason for the meeting, I don't think I have any recollection of it being explained to me as such, but I was familiar with Special Branch work, I understood their remit...to gather intelligence on threats to public order*'.
243. He stated that he responded to a request from Robert Lambert to meet the undercover officer, and this was in a context of race, community disorder, and community tension.
244. Richard Walton that he could not recall the content of the conversation with Robert Lambert. It was a request from a more senior officer to attend the meeting, it was not Richard Walton's idea.
245. He could not recall where the meeting with Robert Lambert took place, but from his perspective, it was a 'chance' meeting. His best recollection was that the meeting was in the foyer at New Scotland Yard.
- Y1d 246. Richard Walton was asked to provide detail of the conversation he had with Robert Lambert. He referred to a page of his initial interview with the Ellison Review to provide his best recollection of the meeting and what was said. He

stated in that interview, Robert Lambert said *"Well if it helps, do you want to..would it help to meet the actual officer"*, and Richard Walton replied, *"...It would allow me to contextualise ...what is going on out there...we are getting all sorts of feeds.."*

247. He could not recall any other conversations with Robert Lambert to make any arrangements to put the meeting in place. He could not recall the timing of the meeting with Colin Black. Richard Walton was adamant that Robert Lambert instigated the meeting.
248. Richard Walton stated that he had met with other undercover officers during his time on Special Branch, so this was not unusual for him and not a unique situation. It was pointed out to Richard Walton that he was in a different role on the SLRT in comparison to his Special Branch role, which he agreed with.
249. He could not give any detail or the rationale for the meeting. He had no memory other than what he had given. At no stage did Richard Walton think the meeting was inappropriate, before, during, after or now.
250. Richard Walton referred to his first Ellison Review interview again (page 15) where he recalled a conversation with Colin Black, which included *'..well you are on the Lawrence Review Team, we have got some coverage around the periphery of the Lawrence family'*, he also spoke about a conduit for intelligence on the back of the Lawrence Inquiry. Richard Walton felt this referred to his later CO24 remit. He could not say when the conversation with Colin Black took place. He could only be certain that he had at least one conversation with Robert Lambert and at least one conversation with Colin Black.
251. Richard Walton pointed out that he did put caveats into his conversations with the Ellison Review, such as *'to the best of my knowledge'*, he could have said that he did not recall, but he was trying to be helpful.
252. Richard Walton was asked if the meeting with the undercover officer was *'secret'*. He said that it was secret in that it was arranged through Special Branch protocols and he would have understood this to be secret, but he pointed out that this did not make it illegitimate. He again pointed out that he was responding to a request from a senior officer, in the context that he has given, and nothing that he heard made him think the meeting was in any way illegitimate.
- D12 253. He again referred to Ellison Review findings which stated, *'... accept that the meeting was not his idea, but a request from a more senior officer at the SDS. We also accept that he agreed to a meeting without any detailed knowledge of the actual role and intelligence covered by an undercover officer...we accept that Mr Walton may have simply taken up the invitation without realising that he was going to meet an undercover officer who was positioned close to the Lawrence family'*. Richard Walton agreed with this finding.
254. He had very little recollection of anything at the meeting. Most of his recollection was reconstruction from the notes provided. He could not recall anything about the officer. His mindset in going into that meeting was about moving forward and he stated the issues in the Robert Lambert file note were CO24 matters.
255. Richard Walton stated that he had a meeting with John Grieve, which he believed to be about that time but he could not recall the exact date.
256. In interview there was a discussion of when Richard Walton was posted from the

- D179
D53
- SLRT to CO24. He stated entries in his Personnel Record suggested this to be around 10th to 18th August 1998. It was put to Richard Walton that a different interpretation of his Personnel Record was that the transfer took place on 05 October 1998, which is recorded in the document. Richard Walton pointed out that there are inaccuracies within MPS personnel records. Richard Walton emphasised that his work on the submissions had finished. Richard Walton believed he could have been in CO24 at the time of this meeting.
257. Richard Walton did not make any notes at the meeting with the undercover officer. He had never seen the file note before the first interview with the Ellison Review and then was shown a (slightly) different note in the second interview.
258. Richard Walton's view of the file note was that it was an 'embellished' version of events, and stated Robert Lambert was known to be 'poetic'. He was asked to provide a view on how accurate the file note was and he replied that he could not say because he did not remember it. It was not a totally fabricated note.
259. Richard Walton highlighted some differences in the documents made available to him during interview, which 'perplexed' him. He stated that N81 was referred to as N81, and himself as [REDACTED]. The second document includes the line '*An excellent meeting and a good example of the strides N81 has made over the last 12 months*', which is not included in the first document.
260. Richard Walton stated that he was perplexed and confused by being told there was a spy in the camp and then being shown a different document.
261. Richard Walton stated that he disagreed with the Ellison Review assertion that the meeting with the undercover officer was put in place to inform the MPS submission. Richard Walton did not accept this assertion.
262. He felt that the issues in the points raised in the meeting with the undercover officer were more CO24 issues. He adamantly refuted the suggestion that the meeting was put in place to assist the submissions, he stated that the content was more about 'moving forward'. He repeated this point a number of times.
263. It was pointed out to Richard Walton that Robert Lambert got the information that Richard Walton 'prepares to draft the final submissions' from somewhere and the only person this could have come from was Richard Walton. Richard Walton maintained that the Robert Lambert file note was embellished but was essentially accurate in terms of the information it contained.
264. Richard Walton was questioned about the Colin Black file note which referred to 'ad hoc meetings'. Richard Walton maintained there was only one briefing, and that was on 14 August 1998.
265. Richard Walton was asked if he briefed anyone on the content of the meeting, and he stated that he could not recall if he did or he did not.
266. He stated his role was not to route intelligence. That would go through existing channels. Richard Walton was outside that chain of intelligence. The conversation was about race and this, in his view, was not an illegitimate conversation. Richard Walton felt it was reasonable to receive a briefing on how race issues were playing out in South London, at that time. However, Richard Walton could not recall if this was the purpose of the meeting.
267. There was a discussion about the legitimacy and appropriateness of the

meeting. Richard Walton stated that he responded to a request to go to a meeting by a senior officer. In his view, the legitimacy of the meeting was not his responsibility, but that of the senior officer who invited him to the meeting. He stated that had heard nothing since, other than the spy in the camp allegations (which he stated we now know there was not), which suggested the meeting was inappropriate. He stated if he was in that same situation he would still go to that meeting.

268. There was further discussion of the sensitivity of the meeting at the time of the submissions and his role in preparing the submissions. There was also no disclosure of the meeting having taken place. Richard Walton stated he had already told the Ellison Review that disclosure of the meeting was not his responsibility as he was a junior officer at the time. This was a matter for Special Branch senior officers.

269. Richard Walton could not recall if he told anyone about the meeting. If this was secret, it was about the risk to the undercover officer rather than any other reason. It was pointed out that the meeting was reported through the SDS channels, but did not appear to have been reported through the SLRT end. Richard Walton pointed out that Special Branch could use their own systems to report the meeting if it was classified as secret.

270. Richard Walton reflected on the content of the file note and stated that he felt that the information flow was more from him to the undercover officer, so he questioned for whose benefit the meeting was arranged. This was a reflection now and not a recollection of the event.

271. Richard Walton clarified the accuracy of his response to the Ellison Review in that he had said he had gone from Stoke Newington to the SLRT but now he could see from his Personnel File that he went to Special Branch, then to the SLRT. This was a mistake. Richard Walton felt the Personnel File clarified for him that his mindset in attending the meeting was about his CO24 role, not his SLRT role.

D92

272. The Meeting Minute of 13 August 1998 showed Richard Walton attended this meeting. Richard Walton stated this did not prove he was on the SLRT, he may have been there from CO24. It was pointed out that the note did not identify where others were from, and all were on the SLRT. The minute did note that *'Race submission is excellent, Counsel only need to add a small factual input'*. Richard Walton suggested this meant his submission had been completed. Richard Walton suggested that the Ellison Review interpretation of this minute and that of meeting on 07 August 1998, showed that the race submission was complete. Richard Walton could not recall anything about either meeting.

D56

273. There was a discussion about a document 'Police Transfer Form' (from Personnel File). Richard Walton had completed this form and had put himself as transferring to CO24 on 01 October 1998. Richard Walton made the same point about the inaccuracy of this information, as it was based on budget transfers and completed without access to Personnel File information. Richard Walton stated that none of these files were accurate. It was pointed out that in none of the files whether accurate or not, was he put as being on CO24 in August 1998.

D151

274. Richard Walton produced a number of documents and articles during his interview which he stated added context to the situation and why he attended

this meeting.

D63

275. Richard Walton referred to the Operation Herne Report. This report referred to the tasking of N81. He stated that this report found that N81 was not tasked into the Lawrence family, there was no evidence N81 met the Lawrence family, there was no evidence any officer was targeted to the Stephen Lawrence Campaign. Richard Walton stated that the public would expect undercover officers to be tasked to violent organisations.

Analysis of the evidence

276. In order to reach conclusions it was necessary for me to analyse and evaluate the evidence. Where I have needed to make factual findings I have applied the “balance of probabilities” standard of proof. In deciding whether something is more likely than not to have occurred, I have had regard to all of the available evidence and the weight to be attached to it.
277. Since this case was one subject to special requirements I am required only to form an opinion about whether there is a case to answer for misconduct or gross misconduct for each subject. In doing so I will not reach findings of fact that would be conclusive of misconduct or gross misconduct which may take place – these findings should be left for any subsequent misconduct hearing or meeting.
278. Richard Walton began his interview with the IPCC by stating that he had been interviewed by the Ellison Review twice and he had now read the Operation Herne Report and the Ellison Review Report. He was trying to put forward an accurate account, but he was now unable to say what he could properly remember or what he was reconstructing in his mind, having the other information available to him. He was satisfied that he had acted with integrity throughout.
279. Richard Walton had been seconded to the SLRT from his role in Special Branch. He had been in the SLRT role for some months and was responsible for completing the MPS submissions on race. He considered himself to be the ‘expert on race issues’ on the SLRT.
280. He stated his recollection of the arrangements to put the meeting in place was poor. However, he recalled that the meeting was initiated from an approach by Robert Lambert, he believed as part of a chance meeting, possibly in the foyer at New Scotland Yard. His best recollection of the conversation with Lambert included the following;
- ‘Well if it helps, do you want to..would it help to meet the actual officer’, to which he responds:*
- ‘...it would allow me to contextualise...what is going on out there..we are getting all sort of feeds..’*
281. Richard Walton placed the context of the meeting in terms of race, community disorder and community tension. He recalled a conversation with Colin Black in which the phrase:
- ‘..coverage around the periphery of the Lawrence family’* is used, the conversation also included discussion of the conduit for intelligence on the back

of the Lawrence Inquiry, which led into the CO24 remit. Richard Walton could not be precise on when the two conversations took place, or which was the first conversation. He accepted that he may have mixed up the timing of the two conversations.

282. Robert Lambert did not provide any detail of the conversation with Richard Walton, but the conversation must have taken place. Both Robert Lambert and Richard Walton suggested an element of chance in the meeting between them, which did not accord with either suggesting that the idea for the meeting with N81 came from the other department or function.
283. Whilst there was no recollection of the conversations from either Colin Black or Robert Lambert, the knowledge of N81's deployment and N81's tasking, sat within the SDS. Robert Lambert was unable to recall who tasked him with arranging the meeting, but he stated the request came from his (SDS) senior management. He agreed that there was contact with Richard Walton to set up the meeting.
284. I consider that it is more likely than not that the meeting was initiated by the SDS side. While there is no direct evidence that the knowledge of the detail of Richard Walton's role was available to the SDS, I consider, on the balance of probabilities that an approach was made to Richard Walton by Robert Lambert.
285. Richard Walton stated that the approach to him was by a more senior officer – a detective inspector – when Richard Walton was an acting detective inspector, effectively a sergeant. This implies that Richard Walton could not refuse the request, albeit he does clarify that he was not 'ordered' to attend the meeting.
286. Richard Walton could not now provide an accurate rationale as to why he attended the meeting with N81. He spoke about the context of the meeting being about race, community disorder and community tension, but the focus of his work at that precise time then becomes relevant. Richard Walton stated that at the time of the meeting he was 'transitioning' from the SLRT to a role in CO24. This was discussed at length in interviews with both the Ellison Review and the IPCC.
287. In the IPCC interviews, parts of Richard Walton's Personnel File were discussed. A memo entitled Accelerated Promotion Course (APC) Phase III (Inspectors) dated 06 August 1998, has an entry dated in August 1998, as follows:
'DS Walton currently on Lawrence Enquiry. Spoke to Bob Quick D/Supt + Richard Walton. Orig (sic) intention to transfer to 2Area, but Mr Grieve wants him to stay & join new Race Hate Unit (under Mr O'Connor 5 Area A CO24'
288. The date of this entry on the memo cannot be clearly read, it is possibly 10 August. The next entry is then dated 19 August 1998, which says:
'Copy of letter sent to DS Walton (Room 1036 NSY). He will try to find out who is dealing with their personnel & let me know'.
289. Entry dated 20 August 1998:
'CO20 deal with Personnel for CO24'
290. Entry dated 09 October 1998:
'DS Walton transferred to CO24 5/10/98 as Insp. Send file to Room 506 NSY'

D53

- D56 291. Richard Walton's interpretation of these documents is that they demonstrate that he transferred from the SLRT to CO24 between 10 and 18 August 1998. So at the time of the meeting with N81, he may not have been part of the SLRT.
- D55 292. However, the document mentioned above clearly stated that '*DS Walton transferred to CO24 5/10/98...*'. Other documentation discussed in interview was a 'Police Transfer Form' which is initially completed by the officer in question. Richard Walton has stated on this form that he was posted to CO24 on 01.10.98 until 18.4.99 – this form was completed on 03 July 2003. A further document referred to is a Career Management Transfer Form' again completed by the officer in question, and which states that Richard Walton was posted to CO24 from '*Dec '98 to Jan'98*', but must refer to 1999. This form lists the secondment to the SLRT (itemised as Lawrence Review Team) from June '98 to Dec '98. This form indicated 'Date of Joining OCU – December 1998', 'Present OCU – CO24 (Racial and Violent Crime Task Force)'.
293. Richard Walton pointed out that Personnel records are inaccurate, in that formal transfer of personnel on a specific date will be confirmed when budget arrangements are in place and an individual is then paid from a specific department's budget. However, it was pointed out to Richard Walton, that when he had the opportunity on the Police Transfer Form and the Career Management Form to identify the date of this transfer to CO24 on neither occasion did he choose to include a date in August 1998. He chose the date of 01 October 1998 or later.
294. It is more likely than not that between 10 and 19 August, Richard Walton was aware that his future lay in CO24, however, on 13 August 1998, two meetings were held at New Scotland Yard, the first beginning at 08.00am (The Lawrence Inquiry Part 1 Submission minutes). Richard Walton was not present for this meeting. A second meeting was held which began at 09.30am, that same day and in the same room, (The Lawrence Inquiry Part 1 Submission minutes), for which Richard Walton was present. In interview with the IPCC, Richard Walton stated that his presence at this meeting did not indicate that he was still part of the SLRT as he may have been there in his CO24 role. The evidence suggested, that it is more likely than not that Richard Walton was present at that meeting because of his SLRT role.
295. It is more likely than not that at the time of the meeting with N81, Richard Walton's role was on the SLRT.
296. In the earlier meeting that day, Jeremy Gompertz, QC, was noted as saying:
'Race-NSY submission is excellent. Counsel need only add a small factual input e.g. RIU at Plumstead'
297. This is strong evidence to support Richard Walton's position when he stated that his race submission was complete. Without direct recollection, he also felt that his mindset in going into the meeting with N81, was about the issues coming out of the SLRT and moving forward, so essentially more CO24 issues rather than SLRT. Richard Walton stated that he felt it was reasonable for him to receive a briefing on how race issues '*were playing out in South London*'. However, he could not recall if this was the purpose of the meeting.
298. Richard Walton could not recall telling anyone that he attended the meeting. There is no evidence from any officer on the SLRT side that they were aware of

the meeting, even after it had taken place.

299. It is more likely than not that Richard Walton was in the position of being asked to attend this meeting because of his role on the Stephen Lawrence Review Team. It is more likely than not that Richard Walton was aware of this and made a decision that he would attend the meeting.
300. As far as it is possible to say, he did not discuss this request with anyone from the SLRT. It is more likely than not that Richard Walton was aware that the remit of SDS undercover officers was around intelligence on public order issues. Richard Walton had worked on Special Branch until just a couple of months before this encounter. In his Special Branch role, it was not unusual for him to meet with undercover officers on tasking issues.
301. However, Richard Walton was no longer in a Special Branch role, he was not directly involved in an intelligence gathering role. There were legitimate intelligence routes for public order intelligence to be passed from N81 to N81's handlers. Richard Walton's presence at the meeting with N81 fell outside of the remit of the undercover officer and, it is more likely than not, fell outside of Richard Walton's remit within the SLRT.
302. Richard Walton pointed out that intelligence from undercover officers, such as N81, and other sources of intelligence, was passing through normal intelligence routes. Some of this intelligence, if gathered at meetings similar to those attended by N81 with N81's interest group, would contain intelligence relating to the Lawrence campaign.
303. Richard Walton's role on the SLRT, at that time, was not an intelligence gathering role. Intelligence gathered by N81 as part of N81's tasking had legitimate routes that it could be passed through.
304. Richard Walton was responsible for drafting the race aspect of the MPS submission. In the final submission document this covers two chapters:
Chapter 15 – Race
Chapter 19 – Issues of Race
305. Richard Walton has maintained throughout all interviews that he had completed the draft of the race submission prior to attending the meeting with N81. This is supported by the minutes of the meeting of the Lawrence Inquiry Part 1 Submission team held at 08.00am on 13 August 1998. The minutes note:
'Race - NSY submission is excellent. Counsel need only add a small factual input e.g. RIU at Plumstead'.
306. The file note prepared by Robert Lambert following the meeting referred to Walton as he *'..continued to prepare a draft submission to the enquiry'*. The note then identified the three areas that the SLRT were addressing, which must be the areas identified by Walton:
1. How to respond to the charge of Institutional Racism
307. The chapters on Race and Issues of Race reviewed the concept of Institutional Racism and included sections contributed to by outside observers of the situation within MPS. The phrases *'racism...both conscious or unconscious'* and *'cultural insensitivity'* both appear in the submission. In the file note, Lambert referred to

'unconscious racism' and 'a lack of understanding of black culture'. The file note appeared to reflect Walton putting forward these expressions.

2. How to handle the second stage of the Public Enquiry

308. This formed no part of the submission. However, N81 passed on intelligence that suggested that a particular location could be vulnerable to disruption by specific groups. This appears legitimate intelligence, in keeping with the tasking of N81 and the public order remit of officers in N81's position. It would be legitimate for Robert Lambert to progress this intelligence. The information provided by N81 did not appear in the submission.

3. How to regain the confidence of the black community

309. The submission chapters on Race and Issues of Race were not specific on these areas, but did include;

'The Commissioner continues to hold as a high priority the quality of police response to racial attacks and all forms of racial harassment. This extends to the recruitment and retention of ethnic minority officers.'

And '...the submission..has outlined many proposals for introducing change in the organisation which will radically affect the service given to victims of racial crime. The Commissioner is determined to develop an 'anti-racist police service' that deals effectively and expeditiously with racial crime.'

310. Both of these summarised the issue of trying to regain the trust of the black community as it was identifying the priorities of the then-Commissioner and his objectives, moving forward. The role of CO24 was not discussed in this section of the submissions or the *'groups that may be prepared to build bridges'*. This was again information that appeared to come from the Richard Walton side to N81.

311. N81's role involved infiltration into an 'interest group' and the file note recorded some discussion that *'..enabled him (Richard Walton) to increase his understanding of the Lawrence's relationship with the various campaigning groups..'*

312. The submission (Chapter 19 Issues of Race, para 53) makes reference to there being *'some evidence of politically motivated groups influencing communication between police and the Lawrence family'* and includes quotes from two sources, Dev Barraah and Mrs (now Baroness) Lawrence. Both referred to potential influence by these groups in the early aftermath of Stephen's murder.

313. In the investigator's opinion there is insufficient evidence for a tribunal to find that Richard Walton used the information provided by N81 in the submissions made by the MPS to the MacPherson Inquiry.

Conclusions

314. Below, I have set out my conclusions for the appropriate authority and Commission to consider.

315. These conclusions are based on the evidence obtained during the investigation and summarised above.

316. If there are to be court or disciplinary proceedings it will be for the relevant

tribunal in those proceedings to make final determinations. For example, where I conclude that person subject to the investigation has a case to answer for gross misconduct, this does not amount to a legal determination that there has been gross misconduct. If a charge is then brought by the appropriate authority a misconduct hearing will hear the evidence, and make its own findings about whether the charge is proved or not.

317. I have made factual findings, where appropriate, by applying the balance of probabilities test to the evidence. In other words, I have decided whether it is more likely than not that the fact alleged occurred.
318. After reviewing my report and considering my recommendations, the Commission will decide whether any organisational learning has been identified that should be shared with the organisation in question. They may also recommend or direct, unsatisfactory performance procedures.
319. The Ellison Review suggested that N81 was tasked into a group that was close to the Lawrence Family Campaign and used the term 'spy in the camp'. The review undertaken by Operation Herne, found that N81 was tasked into an interest group. As part of that group's activities N81 attended public meetings which involved some discussion of aspects of the Lawrence campaign. Operation Herne concluded that there was no evidence found that N81 was tasked to infiltrate the Stephen Lawrence family or any other family campaigning for justice. N81's focus was on their target group. This position is supported in N81's witness statement.
320. However, the true nature of N81's tasking is not in question when considering the potential impact of Richard Walton in his SLRT role attending this meeting. N81 said that N81 had no information that N81 could have passed to Richard Walton about the Lawrence family campaign.
321. There is no evidence Richard Walton sought permission or advice from any senior officer on the SLRT about attending the meeting. Both Lord Condon and Lord John Stevens have said that using intelligence from undercover officers to inform the MPS response was unjustified and unacceptable.
322. There is evidence Richard Walton had completed the drafts of his submissions on race and issues of race by the time of the meeting on 14 August 1998, but also that it was not too late to change them, as the potential for changes (by Counsel) had been discussed in the meeting on 13 August. Similarly, although the setting up of a channel from SDS to CO24 following the meeting supports the suggestion that it may have been arranged in contemplation of his new role, he was still involved with the SLRT and so information from N81 could have been passed to it. For the MPS to be brought into disrepute, it does not require proof that the submissions were changed or that the meeting was solely to do with Richard Walton's role on the SLRT. It is the perception that the MPS could use that information to gain advantage in preparing its submissions to the MacPherson Inquiry that, as identified by the Ellison Review, was reasonably likely to have brought the MPS's reputation into disrepute. Therefore, a reasonable misconduct panel or meeting, properly directed could find that on the balance of probabilities Richard Walton has breached the Discipline Code by attending this meeting.
323. As set out above, the evidence is that Richard Walton was asked to attend the

meeting by a more senior officer, from Special Branch, rather than him instigating it. Also, that he at least had in mind his future role in CO24 in connection with which, receipt of N81's intelligence may have been legitimate. For these reasons it is the investigator's opinion that if found proved a breach of the discipline code would not be so serious that dismissal was justified.

324. **For the above reasons it is the investigator's opinion that Richard Walton has a case to answer for misconduct.**

Terms of Reference 1:

e). What information was provided by Commander Richard Walton during interview to the Review (The Ellison Review) in October 2013, and the reasons for any discrepancies in his evidence when interviewed in February 2014.

The concerns raised by the Ellison Review in respect of the changed recollection of Richard Walton, were included at paragraph 55 of this report, but are repeated for context.

325. The Ellison Review summarises Richard Walton's position in respect of the meeting with N81 as '*...less than straightforward to establish and somewhat troubling*'. The Review then identifies a number of areas where Richard Walton's answers caused concern:

- In October 2013, Walton largely signed up to the accuracy of the SDS documents created close to the time of the meeting. Producing narrative answers to questions such as 'How did the meeting come about?' He provided detailed answers on how the meeting with N81 was relevant to his work on the SLRT and the justification on a public order basis.
- After notification of potential criticism, Walton was interviewed again in February 2014. He said that what he had said in October 2013 had been wrong, he had tried to be helpful and had accepted the accuracy of the notes that he had been presented with, but he had no recollection of events. Walton now firmly believed that he had been working within his CO24 role and was no longer on the SLRT. He challenged the accuracy of the SDS file note.
- The ER found the file note to be a more accurate version of the events at that meeting, having been written just days after the meeting.
- N81's proximity to the Lawrence family campaign and N81's intelligence was the background to any insight he could offer.
- In October 2013, Walton agreed with the file note. The Ellison Review found it difficult to understand how a senior officer would profess to have had his memory refreshed by the SDS file note and give detailed narrative answers about the arrangements and content of the meeting and the consistency with his SLRT role.
- As well as agreeing, he then challenged some of the detail, such as he had not raised the black community and the black churches with N81. This suggested he did have some recollection of the meeting. He stated he had no recall of the correspondence route set up with CO24.
- Walton attended a meeting of the Lawrence Inquiry Part 1 Submission Team on 13 August 1998, in which the submission that he had prepared had been discussed.
- Mr Grieve believed Walton was still working to Bob Quick (SLRT) at the time of

- the meeting.
- There was no clear indicator of when Walton left the SLRT. Walton believed he was 'transitioning'
- The Ellison Review found Richard Walton's changed recollection to be unconvincing.

IPCC Subject Interview – Richard Walton

326. This aspect of the investigation was also covered in the interviews with Richard Walton. It was discussed with Richard Walton that in the first interview he had a conversation with Colin Black in which he was asked if he was comfortable receiving intelligence relating to SDS. Richard Walton said that he was. He was asked if he was comfortable receiving intelligence and he stated that this was taken out of context. He was 'not uncomfortable' receiving the intelligence relating to the Lambeth situation. But throughout his answers he included a caveat that *'...I'm trying to be helpful and to recollect..'*
327. It was then discussed with Richard Walton that in the first interview, when he spoke about the chance meeting with Robert Lambert he recalled some of the conversation, for example *'...would it help to meet the actual operative in the field?'* and he replied *'Yes Bob, I think that would help because it would allow me to contextualise what is actually going on out there because we're getting all sorts of feeds and to speak to a person actually in the field would probably be as good as it gets'*.
328. Richard Walton pointed out that *'...15 years later, I'm not disputing that it's 15 years later being shown for the first time 15 years so I'm trying to recollect what happened in this account'*.
329. In the second interview he stated that someone else was putting him in that position, he agreed that he was not ordered to go, but as part of a hierarchical structure, he could not easily say no.
330. In the second interview, Richard Walton said that he was wrong about the conversation with Colin Black. Richard Walton now said that he could not distinguish between the conversation he had with Colin Black or Robert Lambert.
331. He had initially said that he did receive intelligence, but clarified that this was within his CO24 role. Richard Walton also stated that he did say that he could not remember if he did receive any intelligence.
332. In his first interview Richard Walton said the meeting was helpful. In the second interview he stated that he could not really remember it being invaluable. Richard Walton now stated that he did not recall much of the meeting. He could only speculate that if it had been significant, he would have remembered more of it.
333. On the Robert Lambert file note and the Colin Black note, in the first interview, Richard Walton accepted the document *'I don't dispute this document, It's pretty much as I recall'*. But then in the second interview he did dispute the document and specifically the mention of off-the-record briefings, he did not recall the meeting being *'fascinating and valuable'*.
334. Richard Walton stated that he felt he was being criticised for responding to the Ellison Review by trying correct incorrect criticisms and possible incorrect conclusions. Richard Walton suggested that the Ellison Review wrote to him,

with an opportunity to respond and to clarify matters, inviting representations, but he stated that when he did provide representations he was then criticised for it.

335. It was put to Richard Walton that the criticism came from his change of recollection and he stated;

‘..I go from thinking, it’s a bit strong to embellished, I’m seeing it for the first time 15 years later, the first interview. The second interview I’ve got a different version, but I’ve had time to think about it...my changes of recollection are, I think fairly minor and are based on my thinking through stuff, seeing additional material, having time to pause and look at the detail in a proper manner and not live in interview...’

336. The difference in where he said he was working was discussed. Initially he had said he was on the SLRT or about to be on CO24, but in the second interview he was more definite that he was on CO24, and certainly from his mindset in attending the meeting he stated he was on CO24. Richard Walton stated that his position here had only changed marginally and he stated that the Personnel File documentation supported his position.
337. Richard Walton emphasised that he was trying to assist the Ellison Review, and stated that a changed recollection was not an ethical or breach of disciplinary regulations. He now regretted that he did not seek legal advice before the interviews. He described changes as minor and slight nuances of change. He stated that he had been *‘honourable and tried to tell the truth the best I could and ..I’ve been heavily criticised for it’*.

Analysis of the evidence

338. In order to reach conclusions it was necessary for me to analyse and evaluate the evidence. Where I have needed to make factual findings I have applied the “balance of probabilities” standard of proof. In deciding whether something is more likely than not to have occurred, I have had regard to all of the available evidence and the weight to be attached to it.
339. Since this case was one subject to special requirements I am required only to form an opinion about whether there is a case to answer for misconduct or gross misconduct for each subject. In doing so I will not reach findings of fact that would be conclusive of misconduct or gross misconduct which may take place – these findings should be left for any subsequent misconduct hearing or meeting.
340. Richard Walton began his first interview with the IPCC by stating that he had been interviewed by the Ellison Review twice and he had now read the Operation Herne Report and the Ellison Review Report. He was trying to put forward an accurate account, but he was now unable to say what he could properly remember or what he was reconstructing in his mind, having the other information available to him. He was satisfied that he had acted with integrity throughout.
341. Richard Walton began his interview with the IPCC in December 2014 by stating the above, but the differences in his responses in the two Ellison Review interviews were discussed with him in the interview.
342. Richard Walton stated that he could not remember the timing of the two conversations with Robert Lambert and Colin Black and may have got the order

of the conversations mixed up. However, in his first interview he provided details of the conversation in respect of how and why the meeting was arranged, but in the second interview he stated that he may have been put in the position of attending the meeting. Richard Walton felt that the detail of the conversation with Colin Black about him being on the SLRT was an incorrect recollection.

343. In the first interview Richard Walton agreed with the content of the file note as being an accurate record of the meeting, yet in the second interview he disputed the accuracy of the document, particularly in respect of 'off the record briefings', as this was the only briefing he received. He was now suspicious of the language, did not recall the meeting being 'fascinating and valuable' and could not have thanked the officer for his 'invaluable reporting' as he had never seen any other intelligence from this officer, and was not aware of the group he had infiltrated.
344. Richard Walton stated that he was being criticised in the Ellison Review for trying to correct '*incorrect possible criticisms and incorrect conclusions*'. He stated that the Robert Lambert file note was shown to him for the first time in the first Ellison Review interview, yet he was shown a slightly different version of this note in the second Ellison Review interview. Richard Walton stated that the changes that he had introduced into his account were fairly minor and this was because he had seen additional material. He had, by the time of the second interview had time to look at the detail in a proper manner. He felt his only inaccuracy was his posting before the SLRT, when he had initially said he was in a divisional role, but then realised that he had been in a Special Branch role.
345. Additionally, Richard Walton said that at the time of the meeting he had been 'transitioning' from his SLRT role into CO24, but having reflected in the second interview he was now satisfied that his mindset was all about CO24 and that he had moved on from Lawrence. He felt that the content of the file note was all about the remit of CO24.
346. Richard Walton's representatives wrote to the IPCC in June 2015 and set out a number of representations on the allegations faced by Richard Walton. In respect of the allegation that Richard Walton changed his account, they raise the following:
 - The assumption that Richard Walton was working on the SLRT when he attended the meeting on 14 August 1998. The representation asserted, based on the Personnel File now available, that Richard Walton was not working on the SLRT at the time that as early as 06 August, there was discussion of his move and that plans for his formal transfer were in place between 10 and 18 August 1998. They also refer to the minutes of the meeting on 13 August (and 07 August) and feel that a different conclusion would have been drawn if these were available at the October interview with the Ellison Review..
 - The assumption that there was a 'spy in the camp' with confidential information which could inform the MPS submissions. The representations suggested that if the approach in interview had been on a more '*accurate factual footing*', Richard Walton would have been able to provide the best possible account of the meeting with N81.
 - The misunderstanding of the context of the meeting. The representations referred to the view that the meeting with N81 was '*exceptional*'. However, they made the point that there was other reporting of intelligence by N81 and others

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- on groups of the type that N81 had infiltrated.
 - Haphazard disclosure in interview. The representations suggest the Richard Walton was provided with limited disclosure of a number of documents just prior to his first Ellison Review interview and that he had insufficient time properly to consider these documents. Richard Walton was not shown any additional documents prior to the second interview, but was shown various documents *'in an informal manner'* during the interview. The different version of the same document in the second Ellison Review interview *'unsurprisingly threw Mr Walton off balance'*. They stated that Richard Walton was not provided with sufficient time to fully read the documents prior to interview.
 - Adversarial interview style. The representations suggest that the approach in the second Ellison Review interview was effectively a *'cross examination'* using leading questions, which was not appropriate in a fact finding exercise. They suggested the approach prevented Richard Walton providing his best account and contributed to his misunderstandings.
347. In assessing the information provided by Richard Walton to each interview, the fact that the events being discussed occurred some 15 years earlier cannot be overlooked. It is understandable that the events would not be clear in his mind. He was then presented with what appears to be a record of the meeting, not contemporaneous, but written just four days after, and he adopted the position where he agreed, in the main, with the content. He stated that it even triggered some recall for him and he provided some detail of conversations. The approach he took suggested that these were accurate memories of the arrangements and the meeting that took place with N81.
348. Following notification that he was likely to be criticised for his role in attending that meeting, Richard Walton was further interviewed and provided a different version of his memory. A different recollection which he said was because he had now had time to reflect on and consider in detail. Whilst he now agreed mostly with the detail in the file note, he described it as *'embellished'*.
349. In interview with the IPCC, Richard Walton was clear that he had no direct recollection of the events around the meeting in 1998. This was because of the passage of time, the fact of two interviews with the Ellison Review team, and sight of both the Ellison Review Report and the Operation Herne Report. He was now unable to say what he recollected and what he had reconstructed from other information.
350. He had put forward via his representative some reasons for the differences in his accounts which focus on the manner in which he was interviewed – the assumption that he was working on the SLRT, the assumption there was a spy in the camp, the failure to understand this meeting in context, the haphazard disclosure, and the adversarial interview style.
351. The questions put to Richard Walton to establish his role and his understanding of the role of N81 were, in the investigator's opinion, perfectly appropriate questions. The records of where Richard Walton was posted at the time are not definitive, but on the balance of probabilities, on the evidence available, it is more likely than not that Richard Walton was working on the SLRT at the time of the meeting with N81. It is also the investigator's opinion that it is more likely than not that Richard Walton was aware that his future work would be in CO24.

352. At the time of attending the interviews with the Ellison Review team, Richard Walton was a senior Metropolitan Police Officer, the Head of Counter Terrorism for the MPS. It may be that the way disclosure was handled for the interviews with the Ellison Review team was not what he expected, however, throughout he had the option to ask for a break in the interview, to allow himself time to understand the disclosure more fully. If he was unhappy with the style of questioning he had an option to ask for a break in interview or for the interview to continue at a later stage.

Conclusion

353. The assessment here is in relation to the Standards of Professional Behaviour, as identified in the Police (Conduct) Regulations 2012, Schedule 2, which defines Honesty and Integrity as 'Police Officers are honest, act with integrity and do not compromise or abuse their position.'
354. The Ellison Review found Richard Walton's changed account to be 'unconvincing'. In respect of the IPCC investigation there is evidence that the accounts in the two interviews are different. However in the investigator's opinion there is insufficient evidence, taking into account the difficulties for Richard Walton to be able to remember matters accurately from so long ago and also for any reasonable tribunal now to be able to establish the true facts from other evidence, for it to find that Richard Walton has acted without honesty or integrity.
355. **For the above reasons, it is the investigator's opinion on the basis of the evidence available, that a reasonable misconduct panel or meeting properly directed could not find on the balance of probabilities that there had been a breach of the Standard of Professional Behaviour therefore, there is no case to answer in respect of Gross Misconduct.**

Misconduct

356. For each person under investigation, I must determine whether there is a case to answer for misconduct or gross misconduct. In other words, whether there is sufficient evidence upon which a reasonable tribunal properly directed, could find, on the balance of probabilities that the conduct of the person under investigation fell below the standard of behaviour expected of them.
357. Misconduct is defined as a breach of the standards of professional behaviour.
358. Gross misconduct is a breach of the standards of professional behaviour so serious that, if proven, dismissal would be justified.
359. **On the basis of the evidence presented above it is my opinion that Robert Lambert has a case to answer for misconduct in respect of Discreditable Conduct (Arranging the meeting between N81 and Richard Walton).**
360. **On the basis of the evidence presented above it is my opinion that Colin Black has no case to answer for gross misconduct in respect of Discreditable Conduct (Arranging the meeting between N81 and Richard Walton).**
361. **On the basis of the evidence presented above it is my opinion that N35 has no case to answer for gross misconduct in respect of Discreditable Conduct (Arranging the meeting between N81 and Richard Walton).**
362. **On the basis of the evidence presented above it is my opinion that N34 has no case to answer for gross misconduct in respect of Discreditable Conduct (Arranging the meeting between N81 and Richard Walton).**
363. **On the basis of the evidence presented above it is my opinion that Richard Walton has a case to answer for misconduct in respect of Discreditable Conduct (Attending the meeting with N81).**
364. **On the basis of the evidence presented above it is my opinion that Richard Walton has no case to answer for gross misconduct in respect of Honesty and Integrity (Providing a changed recollection of events to the Ellison Review during two interviews).**

Performance

365. If disciplinary charges are not directed or brought then an appropriate authority may invoke unsatisfactory performance procedures and in some circumstances can be directed to do so. A matter should only be dealt with as either misconduct or unsatisfactory performance, not both.
366. The Commission delegate may wish to consider whether on the basis of the evidence presented above the actions of Colin Black, N35 and N34 although not amounting to a case to answer for misconduct, fell below the standard expected

and that their performance was unsatisfactory.

Provisional organisational learning recommendations

- 367. After reviewing this report, the Commission delegate will consider whether learning has been identified for any organisation involved in the investigation. If any learning is identified, the commission delegate can make organisational learning recommendations and send these to the organisations in question under separate cover.
- 368. Recommendations can include improving practice, updating policy or changes to training.
- 369. Often these recommendations and any responses to them are published on the recommendations section of the [IPCC Website](#).
- 370. The IPCC also works with a variety of stakeholders, including the Association of Chief Police Officers (ACPO) and the College of Policing to disseminate learning coming from investigations undertaken by the IPCC, and by the police service locally. We produce a regular Learning the Lessons Bulletin which is disseminated to senior officers, policy makers, managers and frontline officers and staff working across the police service. These bulletins are also available on the [IPCC website](#).
- 371. In this case, I have not identified any learning which I think the commission delegate may wish to consider.

Criminal offences

- 372. On receipt of my report, the Commission delegate must decide if there is an indication that a criminal offence may have been committed by any person under investigation.
- 373. If they decide that there is such an indication they must decide whether it is appropriate to refer the matter to the CPS.
- 374. In 1998 there was no statutory offence of police misconduct. The only potentially relevant offence is the common law offence of misconduct in a public office. To commit that offence a public officer, which includes a police officer, acting as such must misconduct himself to such a degree as to amount to an abuse of the public's trust in the officer holder, without reasonable excuse.
- 375. Case law has emphasised that the seriousness of the conduct required to commit the offence, it must be "*...an affront to the standing of the public office held. The threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder*". Additionally that the public officer must deliberately do something which is wrong, knowing it to be wrong or with reckless indifference as to whether it is wrong or not. Stupidity or lack of imagination, are not sufficient.
- 376. It follows from the above that whereas there is an objective test for whether an

offence against the Discipline Code of Discreditable Conduct has been committed, whether his or her conduct is reasonably likely to discredit the force's reputation, for there to be a criminal offence, not only does the level of misconduct have to be significantly greater but there is also subjective test. In the investigator's opinion there is no, or insufficient evidence that Richard Walton realised that attending the meeting, which had been instigated by senior officers from Special Branch, would discredit the force's reputation. It is therefore the Investigator's opinion, regardless of whether the conduct may reach the high threshold required, that there is insufficient evidence of knowledge or recklessness, for there to be an indication that the offence may have been committed.

Ellison Review – Walton, Lambert and Black

An investigation into the circumstances surrounding a meeting between A/Detective Inspector Richard Walton and an undercover officer on 14 August 1998

**Independent investigation report
Appendices**

Appendix 1: The role of the IPCC

The IPCC carries out its own independent investigations into complaints and incidents involving the police, HM Revenue and Customs (HMRC), the National Crime Agency (NCA) and Home Office immigration and enforcement staff when the seriousness or the public interest require it.

We are completely independent of the police and the government. IPCC commissioners by law may never have worked for the police.

All cases are overseen by a Commission delegate. Commissioners provide oversight in some of the most serious cases, providing strategic direction and scrutinising the investigation. In other cases, the Commission may delegate this role to a member of its staff.

The investigation

At the outset of an investigation a lead investigator will be appointed who will be responsible for the day to day running of the investigation. This may involve taking witness statements, interviewing subjects to the investigation, analysing CCTV footage, reviewing documents, obtaining forensic and other expert evidence, as well as liaison with the coroner, the Crown Prosecution Service (CPS) and other agencies.

They are supported by a team including other investigators, lawyers, press officers and other specialist staff.

Meaningful updates are provided to families and other stakeholders both inside and outside the IPCC at regular intervals.

Throughout the investigation, a series of reviews and quality checks will take place.

The IPCC often makes early contact with the Crown Prosecution Service (CPS) and are sometimes provided with investigative advice during the course of the investigation however we are asked by the CPS to keep any such advice confidential.

Final reports

Once the investigator has gathered the evidence they must prepare a report. The report must summarise the evidence and refer to or attach any relevant documents. If notices of investigation have been served in the course of the investigation (due to special requirements being attached to a complaint or conduct being recorded) the report must also give the investigator's opinion about whether any police officer or member of staff has a case to answer for misconduct.

The report must then be given to the Commission delegate who will decide if a criminal offence may have been committed by any of the subjects of the investigation and whether it is appropriate to refer the case to the CPS for a charging decision.

The Commission delegate will also decide whether to make individual or wider learning recommendations for the police.

Misconduct proceedings

The report must be given to the appropriate authority responsible for the subjects of the investigation, usually a chief constable. They must then inform the Commission what action they propose to take, in particular whether they will bring misconduct charges in relation to any of the police officers or staff who were subjects of the investigation. If the commission delegate is unhappy with the appropriate authority's response, the Commission has powers to recommend or ultimately direct it to bring disciplinary or unsatisfactory performance proceedings.

Criminal proceedings

If there is an indication that a criminal offence may have been committed by any subject of our investigation the IPCC may refer a subject to the Crown Prosecution Service. They will then decide whether to bring a prosecution against any person. If they decide to prosecute, and there is a not guilty plea, there may be a trial. Relevant witnesses identified during our investigation may be asked to attend the court. The court will then establish whether the defendant is guilty beyond all reasonable doubt.

Inquests

Following investigations into deaths, the IPCC's investigation report and supporting documents are usually provided to the coroner. The coroner may then hold an inquest, either alone or with a jury. This hearing is unlike a trial or tribunal. It is a fact finding forum and will not determine criminal or civil liability. A coroner might ask a selection of witnesses to give evidence at the inquest. At the end of the inquest the coroner and/or jury will decide how they think the death occurred on the basis of the evidence they have heard and seen.

Publishing the report

After all criminal proceedings relating to the investigation have concluded, and at a time when the IPCC is satisfied that any other misconduct or inquest proceedings will not be prejudiced by publication, the IPCC will publish its investigation report.

Redactions might be made to the report at this stage to ensure that individuals' personal data is sufficiently protected and occasionally for other reasons.

Appendix 2: Terms of reference



Terms of Reference

Investigation into the actions and decision making of former Detective Inspector Robert Lambert and former Commander Colin Black in arranging and Commander Richard Walton in attending a meeting in 1998 with an undercover officer deployed close to the Stephen Lawrence family and evidence subsequently provided by Richard Walton to the Stephen Lawrence Independent Review in 2013/14.

Investigation Name:	Richard Walton, Robert Lambert and Colin Black
Investigation Type:	Independent
Appropriate Authority:	Metropolitan Police Service
IPCC Reference:	2014 / 023874 and 2014 / 026749
Commissioner:	Deputy Chair Sarah Green
Lead Investigator:	Deputy Senior Investigator Steve Bimson

Summary of events

The Stephen Lawrence Independent Review (“the Review”) was published in March 2014, examining ‘Possible corruption and the role of undercover policing in the Stephen Lawrence case’. This enquiry was commissioned by the Home Secretary.

The Review makes a finding that in mid-August 1998 a meeting was arranged between an undercover officer, who was deployed into one of the groups seeking to influence the Lawrence family campaign, and (then) acting Detective Inspector Richard Walton, who was seconded to the MPS Lawrence Review Team. This team was involved in drafting the final written submission on behalf of the Commissioner of the MPS to the Stephen

Lawrence Inquiry.

The Review found that ‘..the opening of such a channel of communication at that time to have been ‘wrong-headed’ and inappropriate’. The Review stated that the meeting was ‘a completely improper use of the knowledge the MPS had gained by the deployment of this (undercover) officer’ and that such a meeting was ‘wholly inappropriate’.

Detective Inspector Lambert has stated that he was directly involved in arranging this meeting and the Review found that Commander Black, as a senior manager, was also aware of the meeting.

Mr Walton was interviewed in October 2013 about this meeting and was subsequently informed that he would be criticised in the Review report. Mr Walton was again interviewed in February 2014 when he provided a different recollection of events. The report found ‘Mr Walton’s changed recollection advanced in February 2014 about this meeting to be unconvincing’.

The actions of (now ex-) Detective Inspector Lambert and (now ex-) Commander Black in arranging this meeting in 1998 have been referred to the IPCC and are subject of this Independent investigation. The actions of Commander Walton in attending the meeting in 1998 and in providing evidence to the Review in 2013 and 2014, have also been referred to the IPCC and are subject of this Independent investigation.

Terms of Reference

1. To investigate:
 - a) *The actions and intentions of Mr Lambert and Mr Black in arranging a meeting between acting Detective Inspector Richard Walton, from the MPS Lawrence Review Team, and an undercover officer deployed close to the Lawrence family in August 1998.*
 - b) *The actions and intentions of Mr Walton in attending a meeting with an undercover officer deployed close to the Lawrence family in August 1998.*
 - c) *What other Senior Officers, if any, knew about or were involved in sanctioning the meeting and what were the circumstances and reasons for this.*
 - d) *What information was obtained by Mr Walton and how this was used to influence the MPS Final Submission to the Stephen Lawrence Inquiry.*
 - e) *What information was provided by Commander Walton during interview to the Review in October 2013 and reasons for any discrepancies in his evidence when interviewed in February 2014.*

2. To identify whether any subject of the investigation may have committed a criminal offence and, if appropriate, make early contact with the Director of Public Prosecutions (DPP). On receipt of the final report, the Commissioner shall determine whether the report should be sent to the DPP.
3. To identify whether any subject of the investigation, in the investigator's opinion, has a case to answer for misconduct or gross misconduct, or no case to answer.
4. To consider and report on whether there is organisational learning, including:
 - whether any change in policy or practice would help to prevent a recurrence of the event, incident or conduct investigated;
 - whether the incident highlights any good practice that should be shared.

The amended terms of reference were approved by IPCC Deputy Chair Sarah Green on 16 August 2014.

Appendix 3: People referred to in this report

The IPCC categorises people in three different ways:

- 377. **Subjects** of the investigation (people whose conduct was the subject of the investigation).
- 378. **Witnesses** (people who gave evidence for the investigation). This includes **significant witnesses** (people who saw or heard or otherwise witnessed a significant part of the incident).
- 379. **Experts** (people with expertise in a particular area who were instructed by the IPCC to provide their expert opinion)

Not everyone spoken to during the course of the investigation is referred to in this report. This report makes reference to the following people:

Subjects

Name	Role	Severity	Date notified	Interviewed
Richard Walton	Commander	Gross Misconduct	30 July 2014	19 December 2014
Colin Black	Ex-Chief Superintendent. MPS Special Branch	Gross Misconduct	12 August 2014	18 December 2014
Robert Lambert	Ex-Detective Inspector, Special Demonstration Squad, MPS Special Branch	Gross Misconduct	11 August 2014	16 December 2014
N35	Ex-Detective Superintendent MPS Special Branch	Gross Misconduct	12 May 2015	04 June 2015
N34	Ex-Detective Chief Inspector, Special Demonstration Squad, MPS Special Branch	Gross Misconduct	14 May 2015	24 September 2015

Appendix 4: Evidence referred to in this report

Throughout this investigation a volume of evidence was obtained and reviewed. Not all the evidence gathered during the investigation has been referred to in this report. This report makes reference to the following relevant evidence:

Ref	Details
D203	The Police (Discipline) Regulations 1985 - Reg 4 (1), Schedule 1 and - Discipline Code
D202	Extract of the Police (Conduct) Regulations 2012 - Regulation 3, Schedule 2 and - Standards of Professional Behaviour
D11	The Stephen Lawrence Independent Review: Possible corruption and the role of undercover policing Volume 1. March 2014
D172	Document 4012
D157	Extract folio 3A SDS strategy reports 1998 / 1999 - edited document (previously D1784 - ANS/34)
S2a	Statement of N81 - dated 27/08/2013
S2	Statement of N81, dated 06/10/2015, provided by Slater Gordon Solicitors.
D16	IPCC referral form. Dated 7/4/2014
D201	IPCC referral form re Robert LAMBERT and Colin BLACK, dated 07/04/2014
D63	Operation Herne Report July 2014.
D192	Letter of potential criticism from Ellison to Robert LAMBERT 20/01/2014 (but dated 2013)
D193	Response from Robert LAMBERT to Ellison
D196	Summary of criticism sent to Colin BLACK by Ellison Review
D194	Letter from Colin BLACK to Ellison, dated 03/02/2014
D195	Letter from Colin BLACK to Ellison, dated 11/02/2014
D42	Regulation 16 notice signed by Robert Lambert. Dated 11/08/14.
Y2	Interview with Robert LAMBERT, dated 16/12/2014. Transcript of disc 1
Y2a	Interview with Robert LAMBERT, dated 16/12/2014. Transcript of disc 2

D199	Regulation 16 Notice – N35 signed 12/05/2015
D155	N35 response to Reg 16, dated 12/05/2015
Y4	Interview with N35, dated 04/06/2015, Transcript of disc 1.
D200	Regulation 16 Notice sent to N34 representatives, 14/05/2015
Y5	Interview with N34, dated 24/09/2015, Transcript of disc 1
S1	Statement after caution from N34 dated 08/10/2015, following interview on 24/09/2015
D38	Regulation 16 notice signed by Richard Walton. 30/07/14.
Y1	Richard WALTON interview 19/12/2014. Transcript of disc 1
Y1a	Richard WALTON interview 19/12/2014. Transcript of disc 2
Y1b	Richard WALTON interview 19/12/2014. Transcript of disc 3
Y1c	Richard WALTON interview 19/12/2014. Transcript of disc 4
D89	Minutes of meeting 13/08/1998 - Lawrence Enquiry
D92	Minutes of meeting 13/08/1998 9.30am. Walton present in meeting
D188	Minutes of meeting 16.00 hrs, Friday 07 August 1998 of the Lawrence Inquiry Part 1 submission - supplied to IPCC by Alison MORGAN (Ellison review) on 15/12/2014
D153	MPS submission to part I of inquiry into matters arising from the death of Stephen LAWRENCE CH - 15 and CH -19 only, Sept 1998
Y1d	Transcript of Richard WALTON's police interview, dated 03/02/2014
D12	The Stephen Lawrence Independent Review: Possible corruption and the role of undercover policing Summary of Findings. March 2014.
D150	Copy of Richard WALTON's MPS Personnel file, date given 20/11/2015 Not Included
D179	Handwritten extract of annual performance review sent by WALTON representatives
D53	Memorandum regarding accelerated promotion course. Dated 6/8/1998.
D56	Police transfer form for Richard Walton. Dated 7/7/2014. No paper copy - scanned to Perito.

D151	Letter and bundle of documents presented by Emily CARTER (Solicitor) at start of interview of Richard WALTON on 19/12/2014 Not Included
D55	Career management transfer form for Richard Walton.